No. 85-701.

In the Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION,
APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief for the Appellee

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Questions Presented

1. Whether 2 U.S.C. § 441b prohibits the independent uncoordinated expenditures made by MCFL since §441b(b)(2) defines those expenditures which are prohibited and that section only includes payments made directly or indirectly to a candidate or campaign committee?

2. Whether §441b prohibits MCFL's expenditures since the MCFL newsletter did not contain any express advocacy?

3. Whether MCFL's newsletter is exempt from § 441b's prohibition because it is a newspaper or periodical publication within the meaning of the Federal Election Campaign Act?

4. Whether the phrases "in connection with," "for the purpose of influencing," and "newspaper" contained in § 441b are unconstitutionally vague?

5. Whether the Court of Appeals correctly held that § 441b is unconstitutional if applied to a nonprofit ideological corporation making uncoordinated expenditures to publish its views of political candidates?

6. Whether, if the exemption in § 431(f)(4)(A) applies only to the institutional media, § 441b abridges MCFL's right to equal protection of the laws because it impermissibly regulates the identity of the speaker?

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Statement of the Case

This is an appeal by the Federal Election Commission ("FEC"), the plaintiff below, from the final judgment and decree entered on July 31, 1985, by the United States Court of Appeals for the First Circuit which found that 2 U.S.C. § 441b purported to prohibit corporations from making expenditures in connection with a federal election,[1] but was uncon-

[1] The Act was amended in 1980, two years after the publication of the newsletters. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). These amendments changed the sections relevant to this action only slightly. Except where otherwise noted, citations in this brief refer to the statute as it existed in 1978. Attached as Appendix A is the text of the relevant sections of the Act as they existed in 1978. The FEC in its Jurisdictional Statement has provided a copy of the statute as it exists today.

stitutional as applied to Massachusetts Citizens for Life, Inc. ("MCFL"), a nonprofit ideological corporation making what the Court termed "independent uncoordinated expenditures to publish its views of political candidates." J.S. App. 24a.

MCFL was incorporated in January, 1973 as a nonprofit, grass roots, nonsectarian, nonpartisan, nonstock corporation under Massachusetts law. J.A. 83. At that time, it adopted the following "Statement of Purpose," J.A. 84:

> In recognition of the fact that each human life is a continuum from conception to natural death, the objective of this organization is to foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political, and other forms of activity.

Since its incorporation, MCFL has engaged in a wide range of activities designed to foster respect for human life and to defend the right to life of all human beings, born and unborn. The organization has focused upon a number of issues to foster its goal, including euthanasia, experimentation on fetuses, and others. J.A. 85. It has engaged in many educational activities. J.A. 85-86. It has also participated in radio and television broadcasts on pro-life issues. *Id.* Between 1973 and 1978, MCFL sponsored a variety of legal and political activities and drafted and submitted various pieces of legislation on pro-life issues. J.A. 86-87. It has promoted the flow of information on such issues by distributing pro-life literature, including its newsletter. J.A. 86.

MCFL used various activities such as garage sales, cake sales, and dances to raise funds, in addition to dues from its members[2] and contributions, during the period 1973-1978. J.A. 85. All funds raised by MCFL in 1978 were from individuals; none came from corporations. J.A. 85. In fact, MCFL does not accept contributions from business corporations. J.A. 85, 1[illegible] portion of the contributions, dues, or funds raised by M[illegible] in 1978 were earmarked for specific political activities or for particular candidates. J.A. 85.

[2] The word "members" as used herein is not limited to "members" as that word is used in the Federal Election Campaign Act and defined by this Court in *FEC* v. *National Right to Work Committee (NRWC)*, 459 U.S. 197 (1982).

The primary avenue of communication among MCFL and its members is the MCFL newsletter. J.A. 87. From the outset MCFL and its members have recognized the necessity of building a strong base to achieve their goals, J.A. 90; the newsletter is the major vehicle in that effort.

The first edition of the newsletter was published in January, 1973, the month MCFL was incorporated. J.A. 88. Thereafter, through 1978 the newsletter was distributed fairly regularly, subject only to the availability of funds. J.A. 87-88, 97-98. Contributing members automatically receive the MCFL newsletter by mail. J.A. 88, 98. In addition, the MCFL newsletter is periodically mailed or distributed to all MCFL members. J.A. 88, 98.

MCFL paid all expenses for preparing, printing, and distributing the MCFL newsletter. These costs were met through the contributions, dues, and fund raising activities described above. J.A. 88, 98.

The MCFL newsletter typically is six to ten pages in length, is printed on newsprint paper and is devoted to current news concerning abortion and other pro-life issues. R. 159-325; 347-359.[3] It contains information on past and upcoming MCFL activities and appeals for volunteers and contributions. J.A. 88-89, 98-99. It includes material on political, administrative, judicial and legislative developments. These reports are usually coupled with appeals urging MCFL members to contact decision makers and voice their support of pro-life positions. J.A. 88-89, 98-99. In periods before elections, MCFL regularly

[3] For the convenience of the Court, 10 copies of a supplemental appendix containing copies of the 1978 Special Election Editions in Section A and copies of all MCFL newsletters in Section B have been lodged with the Clerk of Courts (hereinafter, "S.A., Section ___"). One binder containing original newsletters has also been lodged with the Clerk.

printed Special Election Editions of the MCFL newspaper. J.A. 99. The first such edition was printed in September, 1974; two others were printed before September, 1978. J.A. 99.

From the beginning, these Special Election Editions included information on candidates' positions on certain issues. J.A. 99. The publication of the positions of the candidates was intended as an educational service, not as an endorsement of particular candidates. *Id.* See R. 347-354.[4]

The September, 1978 Special Election Edition disseminated information on the voting records and responses to questionnaires of candidates running in the September, 19, 1978 primary. The newsletter states that the "[MCFL] election survey is an educational service to help you cast an informed vote when you go to the polls. . . ." Special Election Edition at 1 in S.A., Section A; R. 347.

The Special Election Edition referred to 50 candidates for federal office and 442 candidates for state office. J.A. 100, 103-104, S.A., Section A. It accurately reported the position of *every* candidate on three central pro-life issues: 1) a "constitutional Human Life Amendment," 2) legislation to prohibit the use of tax funds for abortions, and 3) legislation to provide positive alternatives to abortion. The positions of the incumbents were determined by roll call votes, the positions of the nonincumbents by responses to MCFL questionnaires, J.A. 100, 103-104, 169. Pictures of 13 candidates were included. Most had responded positively on all three questions listed in the MCFL questionnaires. R. 306; S.A., Section A.

Shortly thereafter, MCFL printed and distributed a partial Special Election Edition of the MCFL newsletter for the sole

[4]MCFL is just one of a number of nonpartisan organizations, including Public Citizen, the United Church of Christ, the American Civil Liberties Union ("ACLU"), the United States Chamber of Commerce, and the John Birch Society which disseminate congressional voting records. *See* Certification to the United States Court of Appeals for the Second Circuit in *FEC* v. *Central Long Island Tax Reform Immediately Committee*, No. 78-C-1658 (E.D.N.Y. 1979), J.A. 31-54 and R. 35-111. For the convenience of the Court, MCFL has included copies of the various voting records attached as exhibits to that certification in Section C of the supplemental appendix.

purpose of correcting minor errors in the earlier full Edition's reporting of the voting records of Congressmen Tsongas, Studds and Drinan. J.A. 100, 104; S.A., Section A.[5]

No arrangements were made with any of the candidates listed in the Special Election Edition or the partial Special Election Edition, their campaign workers or political committees to coordinate or prearrange the preparation of the newsletter. J.A. 101, 105. Both editions specifically state that "[t]his special election edition does not represent an endorsement of any particular candidate." J.A. 101, 105.

The approximate cost of preparing, printing and distributing both editions was $9,812. J.A. 101. This cost was entirely paid by MCFL from funds raised in the manner described above. J.A. 101. No candidate, political or campaign committee, and no corporation contributed any money towards the costs of preparing, printing or distributing the Special Election Editions. *Id.*

On March 4, 1982, the FEC instituted an action under the Federal Election Campaign Act of 1971 ("FECA" or the "Act"), as amended, 2 U.S.C. §§ 431 *et seq.*, alleging that in publishing and distributing the newsletters MCFL violated 2 U.S.C. § 441b which prohibits corporations from making contributions or expenditures to a candidate in connection with a federal election. The FEC seeks a civil penalty of $5,000.

The district court below, on cross-motions for summary judgment, entered judgment for MCFL. J.S. App. 25a-38a. It found that MCFL's publication of the Special Election Editions was not an expenditure under § 441b for several independent reasons, J.S. App. 30a-34a, and held, in the alternative, that if § 441b applied to MCFL's activities, it was an uncon-

[5]The FEC's assertion that copies of the Special Election Edition "apparently were distributed publicly," FEC Brief at 4, is based solely upon a letter to which MCFL objected in the court below because it contains hearsay and is not sworn to and so does not comply with Fed. R. Civ. P. 56(e). J.A. 175. The District Court never ruled on the objection because it granted summary judgment in MCFL's favor.

stitutional abridgement of MCFL's rights to freedom of speech, press and association, J.S. App. 38a. The Court of Appeals for the First Circuit upheld the district court's decision solely on the grounds that the statute was unconstitutional as applied to a nonprofit ideological corporation making indirect uncoordinated expenditures to express its views of candidates. J.S. App. 19a-24a.

The FEC timely filed its Notice of Appeal pursuant to 28 U.S.C. §§ 1252 and 2101(a).

Summary of Argument

MCFL's expenditures did not violate § 441b. First, the actual language used in the definition of "expenditure" in § 441b(b)(2), the statutory section dealing with the corporate prohibition, proscribes only a "direct or indirect payment . . . to any candidate. . . ." This comports with the holding in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), which recognizes full constitutional protection for independent expenditures, less protection for contributions, and treats expenditures actually coordinated with candidates as contributions for constitutional purposes. MCFL's expenditures were completely independent. The statute, which intrudes onto First Amendment terrain, should be construed narrowly, consistently with its own language and familiar constitutional principles (pp. 10-12).

Second, even if § 441b were interpreted as purporting to forbid truly independent expenditures, it should only be considered as forbidding only such communications as expressly advocate the election or defeat of clearly identified candidates. MCFL's newsletter, publishing truthful voting records of 492 candidates, is an issue-dominated publication, does not urge readers to "vote for" one candidate or "defeat" another, and should not be deemed to have violated any law (pp. 13-17).

Third, without regard to the previous statutory construction arguments, MCFL's newsletter is a "newspaper" or "periodical

publication" and therefore exempt from the corporate prohibition under § 431(f)(4)(A). Congress intended the exemption to be broadly construed so that § 441b might avoid constitutional infirmity. The newsletter's characteristics make it indistinguishable, constitutionally, from admittedly protected media publications, and the statutory exemption must be deemed to cover it (pp. 18-23).

If § 441b is interpreted as purporting to prohibit MCFL's newsletter it is, as the Court of Appeals held, unconstitutional. Independent expenditures are treated constitutionally as pure speech. Section 441b, in forbidding the expenditures at issue here, thus directly prohibits speech about vital public issues — speech at the core of First Amendment concerns. The fact that an ideological corporation like MCFL could set up a PAC which, in turn, might solicit contributions and make expenditures, does not mean that § 441b is not a prohibition and is merely a time, place, and manner restriction. It is a prohibition of, and thus an infringement upon, political speech (pp. 26-30).

Section 441b as applied to the newsletter published by MCFL, an ideological nonprofit corporation, would be a direct infringement upon the associational rights of MCFL's members (pp. 30-36).

If § 441b forbids MCFL from using its funds to publish its newsletter it infringes upon the freedom of the press guaranteed to MCFL and its members. That freedom extends to pamphlets, leaflets, and occasional publications as much as to daily newspapers (pp. 37-38).

Since § 441b impinges on first amendment rights it can only be upheld if it narrowly serves subordinating state interests. The primary purpose of § 441b, to avoid corruption, is not implicated by independent expenditures. The other possible purposes of the statute are not compelling and, in any event, are poorly served by prohibiting this ideological organization from spending its own funds to publish a voting record newsletter (pp. 38-46).

Section 441b, whose prohibitions depend upon undefined terms: "in connection with," "for the purpose of influencing"

and "newspaper", is unconstitutionally vague (n.19). If the "newspaper exemption," § 431(f)(4)(A), applies only to media corporations the prohibition as applied to MCFL's newsletter would deprive MCFL of equal protection of this law (pp. 46-48).

Argument

I. Publication and Distribution of MCFL's Newsletter Did Not Violate 2 U.S.C. § 441b.[6]

A. *Statutory Framework*

The Federal Election Campaign Act, 2 U.S.C. §§ 431-455, comprehensively regulates all aspects of federal election campaign financing. The terms "contribution" and "expenditure" are central to the regulatory scheme. To place § 441b in context, MCFL will briefly address the definitions of those terms in 2 U.S.C. § 431(e) and (f), leaving aside § 441b for the moment.

The essential distinction is this: contributions refer to money or something else of value provided to candidates or political committees. A contribution is money that will be spent to influence the election. Expenditures refer to the spending itself, rather than the accumulation process. This spending can be done by the candidate or his authorized committee. It can also be done, if not coordinated in any fashion with the candidate, by a committee not authorized by the candidate, or by persons wholly apart from any committee. The latter two types of spending are often referred to as "independent expenditures."

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[6] MCFL recognizes the Court's duty "not [to] decide a constitutional question if there is some other ground upon which to dispose of the case." *Lowe* v. *Securities and Exchange Commission* (SEC), 105 S. Ct. 2557, 2563 (1985), *quoting Escambia County, Florida* v. *McMillan*, 466 U.S. 48, 51 (1984) (per curiam). *See also Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

See, e.g., Buckley v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *FEC* v. *National Conservative Political Action Committee* (NCPAC), 105 S. Ct. 1459, 1466 (1985).

Contributions are thoroughly regulated, scrutinized and limited throughout the statute. *See, e.g.*, 2 U.S.C. §§ 431(e)(1) to (4), 431(e)(5)(G)(i), 431(e)(5)(H), 432, 433, 434, 436(c), 437b, 439a, 441c, 441e, 441f, 441g (Appendix A).

Expenditures are much less regulated. Expenditures by political committees must be reported on approved forms at required intervals. 2 U.S.C. §§ 434(a) and (c), 436(c). Spending by noncandidates other than through political committees is subject to significantly less scrutiny. Only in the case of expenditures "expressly advocating the election or defeat of a clearly identified candidate" does the statute, once again leaving aside § 441b, take any notice. *See, e.g.*, §§ 434(e) and 441d. Some disclosure is required. No dollar limitations are imposed, in keeping with *Buckley* v. *Valeo*.

The following pattern, then, emerges. Contributions are regulated and limited. Expenditures from ostensibly independent sources which are in reality coordinated with a candidate are deemed contributions. Expenditures by political committees are scrutinized but not limited. Independent expenditures by persons other than political committees are unlimited but are reported if they constitute express advocacy of the election or defeat of clearly identified candidates.

The FEC charge that MCFL violated the corporate spending prohibition by making a independent expenditure in distributing its newsletter must be analyzed against this background. It is not remarkable that the prohibition against corporate "contributions or expenditures" found in § 441b has its own definition which, in effect, defines "expenditure" as an indirect contribution. 2 U.S.C. § 441b(b)(2) contains this governing definition:

> For purposes of this section . . . the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit,

> or gift of money, or any services, or anything of value . . . *to any candidate*, campaign committee, or political party or organization, in connection with any [federal] election. . . . [emphasis added].

B. *MCFL's Expenditures Do Not Meet the § 441b Definition of Expenditure.*

MCFL's expenditures for its newsletter are not covered by the plain language of § 441b. The starting point in the construction of a statute is the language itself. *Consumer Product Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980). The language of § 441b makes it clear that what it prohibits is a direct or indirect payment *to any candidate or committee*. Under *Buckley*, 424 U.S. at 47, such indirect contributions may be circumscribed.

The district court properly construed the § 441b definitional terms as exclusive although the section uses "shall include," rather than "shall mean." The general definition section adopts the § 441b definition by stating that an expenditure does not include a payment by a corporation which does not constitute an expenditure under § 441b. 2 U.S.C. § 431(f)(4)(H). There would be no reason for any definition in § 441b if the terms "contribution" and "expenditure" in that section were to be governed by § 431.

The legislative history supports the district court's construction of § 441b. The 1907 Tillman Act, 34 Stat. 864, made it unlawful for any corporation to make a "money contribution" in connection with a federal election. The Labor Management Relations Act of 1947 (the Taft-Hartley Act), 61 Stat. 136 (1947), extended the prohibition to "expenditures" in connection with an election.[7] The purpose of that extension was to pre-

[7] Between 1907 and 1947, Congress made a number of other changes in the statute. The Federal Corrupt Practices Act, 1925, ch. 368, 43 Stat. 1073 (1925) (former 18 U.S.C. § 610), replaced the phrase "money contribution" with "contribution" and added a definition of "contribution." "Expenditure" also was defined, but the corporate prohibition did not extend to that term.

The War Labor Disputes Act of 1943, Pub. L. No. 78-89, 57 Stat. 167 (1943), extended for the duration of the war, the prohibitions of the Corrupt Practices Act to labor organizations.

Section 304 of the Taft-Hartley Act broadened the corporate prohibition to include "expenditures." It did not provide a separate definition of "contribution or expenditure" but, since the Act amended what had been the original Tillman Act, the definition was that added in 1925: "a payment . . . of money, or anything of value, and includes a contract . . . to make an expenditure."

vent expenditures that were actually indirect contributions. *United States* v. *CIO*, 335 U.S. 106, 115 (1948). It was added "to eradicate the doubt that had been raised as to the reach of [the prohibition on] 'contribution,' not to extend greatly the coverage of the section." *Id.* at 122.[8]

In 1972, consistent with this Court's recognition in *CIO* that the expenditure prohibition was designed to catch indirect contributions, the clarifying proviso was added to § 441b: "[a]s used in this section, the term 'contribution or expenditure' shall include any direct or indirect payment . . . to any candidate. . . ."

The Court of Appeals, in holding that § 441b applied to the independent expenditures at issue here, relied solely on the fact that it could find no affirmative statement in the legislative history that Congress intended to narrow the section in 1972 when it added the definition of "expenditure" (despite the statement by Representative Hansen, who sponsored the bill, that "[t]hc net effect of the amendment, therefore, is to tighten and clarify the provisions of section 610 . . . and to codify the case law." 117 Cong. Rec. H43379). The search for such an affirmative statement ignores the fact that the statute already included a broad definition of expenditure in § 431, making the

[8] The FEC has cited the statement in *Pipefitters* v. *United States* that Senator Taft's explanation of the scope of the provision is "controlling" to support its expansive interpretation of the section. In fact, the Court cited his testimony on the *limited reach* of the section because of the danger that the statute would impinge on First Amendment freedoms. "We conclude, accordingly, that his view of the *limited reach* of § 610, entitled in any event to great weight, *is in this instance* controlling." *Pipefitters* v. *United States*, 407 U.S. 385, 409 (1972) (emphasis added).

addition of the definition section in § 441b(b)(2), under the Court of Appeals' interpretation, total surplusage. "This construction, therefore, offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973). Congress should not be presumed to have acted without purpose. In view of the obvious constitutional difficulties raised by a more expansive application, the narrow construction adopted by the district court avoids the grave constitutional issues which inhere in any effort to proscribe truly independent expenditures. *Cf. Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J. concurring).

In construing § 441b, the descending order of intrusiveness which accompanies the use of the terms "contribution" and "expenditure" should be kept in mind. Where the purpose is prohibition — the ultimate in regulation — it stands to reason that only those instances of spending which are indistinguishable from a "contribution" should be deemed within the congressional intent. All other prohibitions in the Act relate to direct or indirect contributions, not to independent expenditures. *See, e.g.*, §§ 441c, 441e, 441f and 15 U.S.C. § 791(h).

Thus the statute proscribes contributions to a candidate and those expenditures which are tantamount to contributions because they are authorized by, or coordinated with, a candidate or committee. *Cf. United States* v. *National Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *American Civil Liberties Union, Inc.* (ACLU) v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom. Staats* v. *ACLU*, 422 U.S. 1030 (1975). The district court found that MCFL did not violate the statute as so construed. The Special Election Editions targeted by the FEC were neither authorized by, nor coordinated with, any candidate. J.A. 344-345; 363-364. In the ordinary course of its business MCFL independently prepared, printed and distributed its newsletters. The fact that MCFL's expenditures are not within the § 441b prohibition is an independent nonconstitutional basis on which the judgment of the Court of Appeals may be affirmed.

C. *Expenditures by MCFL to Publish Its Newsletter Are Not Forbidden Because the Newsletter Contains No "Express Advocacy."*

Whatever definition of expenditure is applied, MCFL's spending is not covered because the newsletters did not contain express advocacy.* The legislative history of § 441b, prior interpretations of that and other sections of the Act, and the Constitution all preclude application of the statute to communications that do not expressly and primarily advocate the election or defeat of a clearly identified candidate by using such specific exhortations as "vote for" or "defeat" that candidate. Neither of the Special Election Editions satisfies these standards.

As pointed out earlier, Congress extended the corporate spending prohibition from "contributions" to "expenditures" only to prevent circumvention of the statute by the argument that "contribution" was confined to direct gifts or payments. If the sweep of § 441b is construed as going beyond indirect contributions, it should be limited to the kind of active electioneering described above. *See generally*, Note, *Corporate and Labor Union Activity in Federal Elections: "Active Electioneering" As a Constitutional Standard*, 49 Geo. Wash. L. Rev. 761 (1981).

Senator Taft repeatedly assured his colleagues that the amendment proscribed only active electioneering. For example, he stated:

> If a labor organization is using the funds provided by its members through payment of union dues to put speakers on the radio *for Mr. X against Mr. Y*, that should be a violation of the law.
>
> * * *
>
> [I]n each case the question is whether or not a union or a corporation is making a contribution or expenditure of funds *to elect A as against B*.

*The Court of Appeals did not decide whether the express advocacy standard would apply since it found that, in any event, the MCFL newsletter constituted express advocacy. *See* p. 16 *infra*.

(Emphasis added.) 93 Cong. Rec. 6440 (1947). He maintained that the prohibition on expenditures would not interfere with a union or corporation's normal activities, even if they were related to an election. *See* 93 Cong. Rec. 6437 (1947). This Court has resorted twice to this legislative history to bolster narrow interpretations of the statute and thereby avoid constitutional issues. *United States* v. *CIO*, 335 U.S. at 122-124; *United States* v. *UAW*, 352 U.S. 567 (1957). In *United States* v. *UAW*, the Court reversed the dismissal of an indictment charging that the defendant labor organization had made illegal expenditures by sponsoring television broadcasts actually endorsing the election of certain candidates but declined to decide the case on constitutional grounds, remanding it instead for further factual development. The Court stated that the district court should consider whether the broadcast "constitute[d] *active* electioneering or simply state[d] the record of particular candidates on economic issues." *Id.* at 592 (emphasis added).

When Congress enacted the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), the sponsor emphasized that his amendment was intended simply to codify prior judicial interpretations and to "carry out the basic intent of [the Act], which is to prohibit the use of union or corporate funds *for active electioneering* directed at the general public on behalf of a candidate in a federal election." 117 Cong. Rec. 43380 (1971) (emphasis added). Similarly, the House Committee report states:

> Of course, expenditures for the communication of views *not advocating the election or defeat of a candidate* would be counted neither as independent expenditures nor as direct contributions to any candidate. . . . The Committee is convinced that this approach makes possible the adequate presentation of candidate-related views by independent groups. . . .

(emphasis added.) H.R. Rep. No. 1239, 93d Cong., 2d Sess. (1974). Blithely ignoring this legislative history, the FEC interprets § 441b as barring expenditures for the purpose of presenting "candidate related views by independent groups," such as MCFL. J.A. 64-65.

In *Buckley*, 424 U.S. at 44, this Court narrowly construed the term "expenditure" in §§ 431(f)(4)(C) and 434(e) as requiring express advocacy in order to save *disclosure* provisions having far less impact than § 441b upon the ability to communicate candidate-related views. Congress cannot constitutionally preclude corporate spending to communicate the corporation's views on public issues. *See First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). Therefore, in order to avoid serious constitutional issues, the statute must be construed as prohibiting only expenditures for communications which contain express advocacy of the election or defeat of a clearly identified candidate.

There was no express advocacy here. Like all MCFL newsletters, the Special Election Editions were published for an educational purpose: to inform readers about the records and positions of all candidates on critical pro-life issues. Mere dissemination of voting records is not express advocacy, as the FEC has belatedly conceded. *See* 11 C.F.R. § 114.4(b)(4) and (5) (1985).[10] In the words of Thomas Jefferson, the MCFL

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[10] The FEC's interpretation of § 441b has been woefully inconsistent, and this case is a hangover from earlier views. In an Advisory Opinion to the Chamber of Commerce of the United States, the FEC stated that distribution of nonpartisan voting records to nonmembers would violate § 441b because the expenditure would be "in connection with" a federal election. AO 1978-18, 1 Fed. Elec. Camp. Fin. Guide, ¶ 5305. Dissenting member Aikens described the voting records as having no reference to any election, or to any Congressman's status as a candidate, and no advocacy of election or defeat. She pointed out the "enormous constitutional questions" raised by the majority opinion. Nonpartisan dissemination of voting records was still assumed by the FEC to be prohibited in 1979 when it found "reasonable cause" to believe MCFL had violated the statute, and in 1980 when it found "probable cause." J.S. App. 46a, *see* FEC probable cause brief, R. 334-336. The FEC still assumed nonpartisan distributions would suffice in 1982 when it answered interrogatory no. 11. J.A. 64-65. Thus the FEC believed that while "express advocacy" may have existed here it was not a necessary element of any violation. In regulations promulgated in 1983, the FEC flip-flopped and now allows corporations to prepare and distribute to the public voting records and voting guides. *See* 11 C.F.R. § 114.4(b)(4) and (5) (1985). What this

editions advocated "good government". They urged readers to vote and to vote pro-life. They referred to certain primaries as offering the reader "a clear choice *on the issue of abortions*." As the FEC points out, not all voters — even voters in favor of pro-life issues — choose to vote on the basis of a candidate's position on abortion. FEC Brief at 32. Whether voters should consider a candidate's stance on abortion — as opposed to environment, weapons build-up, or balanced budget — as central in deciding how to vote is itself a public issue and one on which MCFL was taking a stand. It was advocating abortion as the number one issue. The statement "vote pro-life" is a statement on an issue — what to look at in deciding how to vote — and not advocacy of the election or defeat of any candidate.

The newsletters were, in short, issue-oriented. Nowhere did they exhort the reader to "vote for" or "defeat" any of the candidates whose positions were recorded. To the contrary, both editions clearly stated: "This special election edition does not represent an endorsement of any particular candidate." Further, in many of the races, the positions of opposing candidates on the abortion issue were indistinguishable. The substance of the communications resembles the "issue advocacy" protected in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978) and *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290 (1981), rather than the "candidate advocacy" permitted to be regulated in limited ways by *Buckley*, 424 U.S. at 79-82.

The Court of Appeals' finding that the newsletters constituted express advocacy focused on the statement "that your vote in the primary will make the critical difference in electing pro-life candidates" and the fact that pictures of certain candidates were displayed. The statement certainly does not comport

change in position shows (since there was no change in statutory language) is that even the FEC, the agency with authority to interpret the Act, is not sure what is covered by its language. This underscores the fact that the statute is unconstitutionally vague. *See* n.19, *infra*.

with the *Buckley* definition of express advocacy. It merely bespeaks the importance of the abortion issue.

The pictures by themselves cannot constitute express advocacy. *Buckley* requires "express *words* of advocacy of election or defeat." *Buckley*, 424 U.S. at 44 n.52 (emphasis added).[11] At most, the pictures were relevant to whether there was a "clearly identified candidate." *See* 11 C.F.R. § 100.17. This is not the first time that the FEC has attempted to merge the two requirements. *See FEC* v. *American Federation of State, County and Municipal Employees* (AFSCME), 471 F. Supp. 315 (D.D.C. 1979). Printing the pictures of candidates who answered "yes" to questions posed by MCFL can be viewed as a way of projecting candidates' responses. Since the FEC finally concedes that voting records and responses to questions can be printed, it should not be allowed to protest the method chosen to communicate that information. In any event, a communication "primarily devoted to subjects other than the express advocacy of the election or defeat of a candidate" cannot be proscribed. *Cf. FEC* v. *AFSCME*, 471 F. Supp. at 316. The MCFL Special Election Editions were primarily devoted to pro-life issues. They were not "unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. Moreover, the Special Election Editions were not disseminated for the "express purpose" of encouraging election or defeat of a particular candidate. *FEC* v. *Central Long Island Tax Reform, Etc.*, 616 F.2d 45, 53 (2d Cir. 1980). The absence of "express advocacy" is an additional independent non-constitutional basis upon which to affirm the judgment of the Court of Appeals.

[11] Indeed, often the pictures of two opposing candidates were printed. For instance, the pictures of the Democratic and Republican candidates for United States Senate, Howard Phillips (D) and Avi Nelson (R), both were displayed. Additionally, the Special Election Editions contained the picture of Congressman Thomas O'Neill, the Speaker of the House, even though as Speaker he had no vote and did not return a completed questionnaire. R. 306; S.A., Section A.

D. *The MCFL Newsletter is Exempt Under § 431(f)(4)(A).*

The newsletter is also exempted from the definition of "expenditure" by § 431(f)(4)(A) which protects: "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication. . . ." The FEC suggests that this exemption is a "news media" or "communications media" exemption, FEC Brief at 7 and 18. However, properly construed, it must refer to the form of communication rather than the communicator because "in the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Bellotti*, 435 U.S. 765, 784-785 (1978).[12]

The MCFL newsletters are printed on newsprint, in sheet form, without a permanent binding; their contents are customarily the product of a staff rather than a single author; they comment on a wide range of current pro-life developments; and they are distributed relatively regularly. J.A. 149, 158-325, 340. *See Pacific Gas & Elec.* v. *P.U.C. of California*, 106 S. Ct. 903, 907-908 (1986), where this Court recently described a public utility's billing insert as "[i]n appearance no different from a small newspaper, *Progess'* contents range from energy-saving tips to stories about wildlife conservation, and from billing information to recipes," and concluded that it "receives the full protection of the First Amendment."

[12] A majority of this Court recently affirmed that the First Amendment gives no more protection to the institutional press than it does to others exercising their freedom of speech. *See Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985) ("We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection." (per Brennan, J., Marshall, Blackmun & Stevens, J., dissenting)), *id.* at 2958; ("[I] agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech" . . . "And this court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten" (per White, J.,)), *id.* at 2953, 2953 n.4.

The FEC's argument that even if the newsletter is a newspaper or periodical publication, the Special Election Editions are not, is meritless. The Special Election Editions, though devoted primarily to the publication of voting records, are closely linked to other editions of the newsletter, sharing as they do the focus on pro-life issues. To attempt to distinguish the Special Election Editions from the regular newsletters, as did the Court of Appeals, on the basis of number of copies printed, and the type of masthead is nonsensical. Many daily newspapers have a Sunday edition which has a different editorial staff, and a significantly larger circulation. That edition does not lose its status as a newspaper simply because of those differences (nor would a "special election edition" or an election "extra" of a daily newspaper lose its newspaper status where numerous extra copies were printed in anticipation of strong public interest in the subject). Indeed, the point should not be lost that the MCFL newsletters (including the Special Election Editions) were not slick, professional productions. Virtually every edition varied in some way: some were dated, others were not; several did not have volume numbers; some were typed, while others were printed. These differences were apparently due to the vagaries of funding or the identity of the people preparing the particular edition.[13]

Whether or not MCFL's newsletters fall within the exemption cannot turn on superficial notions of form.[14] To compel

[13] The Court of Appeals makes the assumption that there was a newsletter "staff" and gives as one reason why the Special Election Editions were not exempt as newspapers the fact that they were not prepared by that staff. J.S. App. 18a. There was testimony that the editor of the 1978 Special Election Edition had only worked on that one newsletter, but the fact that only one issue was brought out while she was editor seems irrelevant. J.A. 143. While the organization itself did have paid staff members, *see* J.A. 88, there is nothing in the record to indicate that there was a paid newsletter staff as such. The record *is* clear that MCFL considered that it published *a newsletter* that came out with regular and special editions from time to time, *see* J.A. 87-89, 97-105, and that the newsletter was prepared entirely by MCFL members. J.A. 88.

[14] The FEC has not adopted regulations defining the terms used in the exemption, but has suggested reference to its regulations for staging of political debates, 11 C.F.R. § 110.13, which define *bona fide* newspapers and periodical

MCFL to adopt a particular form or style of publication or to publish on a schedule agreeable to the FEC but not responsive to MCFL's needs would be to allow the government to impose "time, place or manner regulations" based on the content of speech. Further, such regulation would impose burdens on MCFL involving "more cost and less autonomy" than its chosen form, manner and timing of publication. *Linmark Assoc.* v. *Willingboro*, 431 U.S. 85, 93 (1977). MCFL would be impermissibly compelled, under the FEC's construction of the exemption, to expend money solely to alter the form and style of the newsletters or to publish the newsletter when it had nothing to communicate. *Cf. Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Elec.* v. *P.U.C. of California*, 106 S. Ct. 903, 909 (1986). For constitutional reasons, the exemption must be broadly construed to include MCFL's Special Election Edition newsletter.

Legislative history, though sparse, clearly evinces a congressional intent to give the terms "newspaper" or "periodical publication" the widest possible definition. Less than a year after the Taft-Hartley Act first extended the prohibition to corporate "expenditures," in a case involving a labor publication, *The CIO News*, this Court narrowly construed the provision. *United States* v. *CIO*, 335 U.S. at 121-124. The Court noted, "[i]t would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication." *Id.* at 123. The Court's concern was not limited to internal corporate and union communications. The Court stated that if the prohibition

> were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members,

publications as those which appear at regular intervals and derive their revenues from subscriptions or advertising. Those regulations are inconsistent with the purpose and legislative history of the exemption, and indeed would exclude the progenitors of most of today's dailies.

> stockholders or *customers* of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the *gravest doubt would arise in our minds as to its constitutionality*.

Id. at 121 (emphasis added).

Some 26 years after *United States* v. *CIO*, Congress enacted the exemption foreshadowed in the *CIO* opinion. FECA Amendments of 1974, Pub. L. No. 93-433, Title I § 102(d), Title II § 201(a)(5), 86 Stat. 3 (1974). The House of Representatives Report stated that the exemption of "newspapers, magazines and other periodical publications" from the definition of "expenditure"

> make[s] it plain that it is *not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press or of association*.

(Emphasis added.) H.R. Rep. No. 1239, 93d Cong., 2d Sess. 4 (1974).[15] Unquestionably, depriving MCFL of the benefit of § 431(f)(4)(A) would burden its First Amendment freedom of the press and of association. *See* Section II *infra*.[16]

Further, one member of the Committee specifically observed that "[t]his provision . . . may exempt some special interest

[15] The earliest newspapers were more akin to the MCFL newsletter than is the "bona fide newspaper" sanctioned by the FEC. *See* A. Smith, *The Newspaper, An International History* (London 1979). They were published "not periodically but as occasion demanded" (at 7) and political news dominated (at 9).

[16] That Congress intended the exemption to be given a broad application is evidenced by the simultaneous enactment of a disclosure provision containing a much more limited newspaper exemption in 2 U.S.C. § 437a which has since been repealed. The FEC has tried to interpret § 431(f)(4)(A) as if it contained the repealed § 437a limitation, invalidated as unconstitutional by the Circuit Court (but not appealed to this Court) in *Buckley* v. *Valeo*, 519 F.2d 821, 869-878 (D.C. Cir. 1975) (en banc) (per curiam).

publications which may be extremely useful and effective to certain candidates during a campaign." *Id.* Thus, the fact that the MCFL Newsletter may have been useful to certain candidates by publishing those candidates' positions on an issue of vital concern to many voters does not change the fact that such newsletters were intended by Congress to be exempt.

Sensitivity to First Amendment freedoms has led this Court to construe broadly a narrower exemption than that found in this case. In *Lowe* v. *SEC*, 105 S. Ct. 2557 (1985), the Court held that the exemption in the Investment Advisors Act of 1940 for "the publisher of any *bona fide* newspaper, news magazine, or business or financial publication of general and regular circulation" applied to a newsletter advertised as a semi-monthly publication (although only eight issues were published in 15 months) with subscriptions ranging from 3,000 to 19,000.[17] The opinion stressed that "[i]n areas where legislation might intrude on constitutional guarantees, we believe that Congress, which has always sworn to protect the Constitution, would err on the side of fundamental constitutional liberties when its legislation implicates those liberties." *Id.* at 2571 n.50, *quoting Regan* v. *Time, Inc.*, 468 U.S. 641, 104 S. Ct. 3262, 3292 (1984) (Stevens, J., concurring in part, and dissenting in part). Since the exclusion in *Lowe* was deemed to contain "extremely broad language," the exemption at issue here, which does not require that the newspaper be "*bona fide*" or "of general and regular circulation," must be construed in the broadest sense.[18]

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[17] To avoid constitutional questions, the only courts to have addressed the newspaper exemption have viewed it as granting broad protection to publications. *See FEC* v. *Phillips Pub., Inc.*, 517 F. Supp. 1308, 1312 (D.D.C. 1981); *Reader's Digest Ass'n* v. *FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981). Even the FEC has acknowledged "the overriding protection of the First Amendment in this area." MUR (matter under review) 296 (76), quoted in *FEC* v. *Phillips Pub., Inc.*, 517 F. Supp. at 1312.

[18] *See also United States* v. *Kelly*, 328 F.2d 227, 236 (6th Cir. 1964) (daily horse racing finger sheet constituted "newspaper or similar publication" exempt from prohibition against interstate transportation of wagering paraphernalia); *Friedman's Exp. Inc.* v. *Mirror Transp. Co.*, 169 F.2d 504 (3d Cir. 1948) (comics section of Sunday newspaper was by itself "newspaper" exempt from certification requirements of Interstate Commerce Act); *In re Sterling Cleaners & Dyers, Inc.*, 81 F.2d 596, 597 (7th Cir. 1936) (daily publication giving news and notices of proceedings in Chicago courts, held "newspaper" under Bankruptcy Act); *King County* v. *Superior Court*, 199 Wash. 591, 92 P.2d 694 (1939) (weekly publication principally espousing views of political organization is a "newspaper"); *In re Bibb Co.*, 117 Minn. 214, 135 N.W. 385 (1912) (daily finance and commerce publication is a newspaper).

The district court correctly held that MCFL did not violate 2 U.S.C. § 441b because the publication and distribution of its newsletters was exempted by § 431(f)(4)(A).[19]

II. The Court of Appeals Correctly Held that Section 441b Is Unconstitutional As Applied to a Nonprofit Ideological Corporation Making Independent Expenditures.

Although the Act has been the subject of repeated constitutional attack, both this Court and lower federal courts have strained to construe it so as not to apply to the activities which the government sought to proscribe, regulate or chill.[20] If MCFL's expenditures are prohibited by § 441b, that section, as both the district court and Court of Appeals held, is unconstitutional.

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[19] If § 441b applies to MCFL's activities, it is unconstitutionally vague under the Fifth Amendment. The phrases "in connection with," "for the purpose of influencing," "newspaper" and "periodical publication" do not give sufficient warning as to precisely what activities are prohibited. *See Smith* v. *Goguen*, 415 U.S. 566, 574 (1974); *Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983). Even the FEC does not have a definition for the term "newspaper." A statute which has such potential for chilling speech must be drawn with precision. "[I]t is difficult to conceive a statute affecting [First Amendment] rights more lacking in precision, more broad in the scope and uncertainty of its reach." *United States* v. *CIO*, 335 U.S. at 151 (Rutledge, J., concurring).

[20] Section 441b has been before this Court on four occasions. *Cort* v. *Ash*, 422 U.S. 66 (1975); *Pipefitters* v. *United States*, 407 U.S. 385 (1972); *United States* v. *UAW*, 352 U.S. 567 (1957); *United States* v. *CIO*, 335 U.S. 106 (1948). Five Supreme Court Justices (Rutledge, Douglas, Murphy, Warren and Black) have opined at different times that the section is unconstitutional.

A review of this Court's election law cases beginning with *Buckley* v. *Valeo*, 424 U.S. 1 (1976), establishes certain fundamental propositions and provides a framework for analyzing § 441b. *Buckley* was a challenge to certain of the contribution and expenditure limits contained in the Federal Election Campaign Act of 1971, as amended in 1974. The Court held that only the governmental interest in preventing corruption or the appearance of corruption was significant enough to justify restrictions upon fundamental First Amendment guarantees of freedom of speech and association, *id*. at 26, and that independent expenditures, however large and effective, enjoy a highly protected status because they have at most a tenuous potential for causing corruption. *Id*. at 22-23. Therefore, no limit on independent expenditures was allowed.

Two years after *Buckley*, the Court struck down a state criminal statute which prevented banks and business corporations from spending money to publicize their views in opposition to a referendum issue. *Bellotti*, 435 U.S. 765 (1978). In *Bellotti*, the Court held that the corporate status of the speaker does not deprive speech of its First Amendment protection. Even several of the dissenting justices indicated that if the corporation is the nonprofit outgrowth of individuals joining together to advocate common views, the corporate status of the speaker, far from *depriving* speech of its protected status, if anything would *increase* the protection because the corporation enhances and secures the rights of its individual constituents. *Id*. at 805 (White, J., dissenting, Brennan, J. and Marshall, J., joining).

In *FEC* v. *National Right To Work Committee* (NRWC), 459 U.S. 197 (1982), the Court held that a provision of FECA related to the prohibition of corporate campaign contributions to political candidates did not violate the First Amendment. NRWC had challenged the restriction imposed on nonstock corporations soliciting contributions for a segregated fund set up for the purpose of contributing to candidates. The limitation on solicitation was upheld because of the constitutional validity of regulation of corporate contributions to candidates for public office. *Id*. at 208-210. Neither solicitation nor contributions is at issue here.

Last year, in *FEC* v. *NCPAC*, 105 S. Ct. 1459 (1985), limits on independent expenditures by an incorporated political committee were held to violate the First Amendment. The Court reaffirmed the conclusion in *Buckley* that independent expenditures have no potential for corruption since "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id*. at 1469, quoting *Buckley*, 424 U.S. at 47.

These decisions establish certain fundamental propositions: (i) the governmental interest in preventing corruption or the appearance of corruption may sustain contribution or expenditure regulations, both of which restrict fundamental First Amendment guarantees of freedom of speech and association, (ii) independent expenditures, however large and effective, are highly protected because they have no or, at most, a tenuous potential for corruption, (iii) the corporate status of the speaker does not deprive speech of its protection under the First Amendment and, (iv) where the corporation is the nonprofit outgrowth of individuals having joined together to advocate their common views, the corporate status of the speaker increases the degree of protection to be accorded.

Despite the backdrop of these decisions, the FEC maintains that § 441b has no impact upon the constitutional rights of MCFL. It accomplishes this sleight of hand by viewing § 441b as a mere regulation of the method of financing political speech which it claims serves a variety of compelling interests, disregarding the fact that these same interests have been rejected by this Court or are not the least restrictive way to accomplish the same objectives. The principles underlying the election law cases compel affirmance of the First Circuit's opinion that § 441b is unconstitutional as applied to MCFL.[21]

[21] Since *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), a number of commentators have concluded that to the extent that § 441b is con-

A. *Section 441b Impinges on Freedom of Expression.*

The First Amendment has its "fullest and most urgent application" to the conduct of campaigns for political office including, of course, discussions of candidates and all matters relating to the political process. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 271-272 (1971). *See, e.g., Brown* v. *Hartlage*, 456 U.S. 45 (1982); *Bellotti*, 435 U.S. at 776; *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966). The "free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy — the political campaign." *Brown* v. *Hartlage*, 456 U.S. at 53. The protection, moreover, extends to critical discussions of public officials and to vigorous advocacy of their election or defeat. *See Buckley*, 424 U.S. at 48, 52-53; *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Expenditures for protected communications are safeguarded no less than pure speech, *Buckley*, 424 U.S. at 16-17, even where the speaker (the spender) is a corporation. *Bellotti*, 435 U.S. at 784; *Pacific Gas & Elec.* v. *P.U.C. of California*, 106 S. Ct. 903 (1986). Thus, a restriction on expenditures for

strued to prohibit independent expenditures by any corporation, it is unconstitutional. *See, e.g.*, Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 Ariz. L. Rev. 373 (1981); Nicholson, *The Constitutionality of Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 Cornell L. Rev. 945 (1980); Birnbaum, *The Constitutionality of the Federal Corrupt Practices Act After First National Bank of Boston* v. *Bellotti*, 28 Am. U.L. Rev. 149 (1979); *First National Bank of Boston* v. *Bellotti — Money Talks: Constitutional Protection of Corporate Speech*, 8 Cap. U.L. Rev. 575 (1979); Note, *Corporate Free Speech: First National Bank of Boston* v. *Bellotti*, 20 B.C.L. Rev. 1003 (1979); *First National Bank* v. *Bellotti*; *The Constitutionality of Government Restrictions on Political Spending by Corporations*, 16 Hous. L. Rev. 195, 208 (1978).

Moreover, in Canada, federal legislation which prohibited all persons, including corporations, from incurring "express advocacy" expenditures during an election was struck down by the court as violative of the Canadian Charter of Rights and Freedoms (the "Charter"). *National Citizen's Coalition Nationale des Citoyens Inc.* v. *Attorney General of Canada*, [1984] 5 WWR 436 (Alta. Q.B.). In its decision the court drew no distinction between corporate speech and individual speech and essentially followed *Buckley*.

the publication and distribution of MCFL's newsletter intrudes on a core area of expression of MCFL and its members.[22]

Because § 441b is aimed at a type of speech — political speech — there is no way to pigeon hole it as a time, place and manner regulation. *Linmark Assoc., Inc.* v. *Willingboro*, 431 U.S. 85 (1977). It is an impermissible content-based regulation since, as the Court of Appeals noted, "it is the political *content* which runs afoul of the statute (emphasis in original)." J.S. App. 20a. It does not save the statute that it does not discriminate on the basis of the speakers' views, but outlaws an entire topic. As this Court stated in *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 537 (1980):

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

(Citations omitted.) *See also Federal Communications Comm'n* v. *League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 3119-3120 (1984).

The FEC argues that § 441b does not restrict political speech because MCFL could have administered a separate segregated fund (a "PAC"), and that PAC could have published and distributed the newsletter. FEC Brief at 21-22. This argument at best seems to treat the Act as a time, place and manner restriction, which is thoroughly inappropriate, as MCFL has demonstrated above. *Compare Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983) (Congress constitutionally may choose not to subsidize a charitable organization's lobbying). More basically, it is inconsistent with the major thrust of the

[22] There is no doubt that an association, like MCFL, though a corporation, may assert the constitutional rights of its members. *See, e.g., NAACP* v. *Button*, 371 U.S. 415, 428 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958). *Cf. Warth* v. *Seldin*, 422 U.S. 490, 511 (1975).

FEC's position: that corporations must be forbidden to use their general funds for electoral purposes because of the "widespread abuses" this would allow, which abuses would present "imminent danger of corruption" and result "in a decline of public confidence in the integrity of elected officials. . ." FEC Brief at 30. The FEC cannot have it both ways. Section 441b cannot be a rather innocuous rearrangement of the manner in which the speaker is allowed to proclaim its message and at the same time be the rugged and absolutely necessary dam holding back the flood tide of tainted money which would drown the electoral process in corruption. There should be no mistake here: § 441b, if interpreted as the FEC suggests, is a prohibition of corporate speech, not a channeling of corporate spending. Prohibitions infringe speech. This prohibition must rise or fall dependent on whether it meets the tests applicable to serious, content-regulating infringements.

MCFL is an active vibrant organization, with a highly focused point of view, which gathers funds for its treasury from various activities. If it raises $50 from selling roses, $200 from a dinner dance, $75 from a garage sale and $100 from unsolicited donations from like-minded people, there is no doubt that forbidding any of those monies to be used to defray printing costs of an election newsletter, and forcing the organization to set up a bothersome PAC for this kind of funding, is a serious infringement, and not merely a benign, formal shaping of expression.

In any event, as applied to MCFL, the right to establish a PAC was meaningless. MCFL did not have "members" as that term is used in the Act. Thus, it would have been permitted to set up a separate segregated fund, but would have been prohibited from soliciting contributions to the fund except from the directors and their families.[23] *See FEC* v. *NRWC*, 459 U.S.

[23] To paraphrase the Court's comment in *Buckley*, 424 U.S. at 19 n.18, being free to engage in unlimited political expression while subject to the FEC's restrictions is like being free to drive an automobile as far and as often as one desires on a quarter of a tank of gas.

at 205-206. The Court in *Buckley* stated:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. *The distribution of the humblest handbill* or *leaflet entails printing, paper and circulation costs.*

(Emphasis added.) *Buckley*, 424 U.S. at 19. There can be no question that the FEC's proffered alternative would restrict the quantity of MCFL's speech.

Moreover, requiring an ideological corporation to use a PAC to carry out its political advocacy presents particular problems which may chill the corporation's exercise of its First Amendment rights even if § 441b could be viewed as a time, place and manner regulation. The Act imposes burdensome administrative and recordkeeping requirements on PACs, *see* 11 C.F.R. Part 114, which an ideological corporation with limited funds may find too difficult or expensive to undertake and so, instead, may choose not to bother.[24]

Additionally, FECA requires PACs to disclose the names of contributors. 2 U.S.C. § 434(b)(3). As the Court of Appeals found, J.S. App. 21a, in an area of sensitive First Amendment rights, mere disclosure may be sufficient to deter. *FEC* v. *Hall-Tyner*, 678 F.2d 416, 420 (2d Cir. 1982), *cert. denied*, 459 U.S. 1145 (1983). *See also Brown* v. *Socialist Workers'*

[24] The FEC makes some point of the fact that MCFL eventually established a PAC. MCFL objected below to any reference to this under Fed. R. Evid. 407. The district court, entering judgment for defendant, did not rule on this objection, which MCFL continues to maintain. In any event, the PAC was created only after the *in terrorem* effect of enforcement proceedings by the FEC and was possible only after the Articles of Organization and bylaws had been amended to create membership categories. The organization creating the PAC was a different type of corporation than the one sued by the FEC.

'74 Campaign Comm., 459 U.S. 87 (1982). A majority of the population disagrees with MCFL. J.S. App. 31a. Contributors might well be deterred if their names would be disclosed. As the Court in *Buckley* found, requiring public disclosure of the name of a speaker as the price for speaking is permissible only when the government can show that "the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Buckley*, 424 U.S. at 81. As discussed in Section IID *infra*, this requirement is not met.

In short: a prohibition on spending from the corporate treasury is a prohibition of speech. Even if § 441b were deemed a limitation and not an outright prohibition, such a limitation would significantly affect freedom of speech.

B. *Section 441b Impinges on the Freedom of Association of MCFL and its Members.*

1. History of Associations

Associations are as old as the concept of ordered liberty and are basic to our democratic society. As Alexis DeTocqueville observed over a century ago, this is because:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears . . . almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

1 A. DeTocqueville, *Democracy in America* 196 (P. Bradley ed. 1945).

The "practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control* v.

Berkeley, 454 U.S. 290, 294 (1981). For "one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means." *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982). Indeed, though America is famed for being individualistic, its history is truly a biography of a nation of joiners. *See* Schlesinger, *Biography of a Nation of Joiners*, 50 Am. Hist. Rev. 1 (1944). The vast and intricate mosaic of voluntary organizations occupies a crucial place in American history. Factional debate spawned by such organizations is integral to the political process. *See, e.g., United States* v. *CIO*, 335 U.S. at 143-144 (Rutledge, J., concurring):

> The expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative processes. They could hardly go on without it. Moreover, . . . that right is secured by the guaranty of freedom of assembly, a liberty essentially coordinate with the freedoms of speech, the press, and conscience.

In constantly demonstrating the underlying unity that warrants diversity, these associations "have served as a great cementing force for national integration." *Biography of a Nation of Joiners, supra*, at 25.

In modern times, as the means of communicating with his fellows becomes increasingly inaccessible to the single individual, the right of association has assumed greater importance because only by associating with others can an individual multiply his resources and gain access to the media. *See, e.g., Buckley*, 424 U.S. at 19.

2. Judicial Recognition of the Right of Association

In keeping with the unique importance of voluntary associations, this Court has repeatedly recognized "freedom of association" as one of the preferred rights derived from the First

Amendment's guarantees of speech, press, petition and assembly. L. Tribe, *American Constitutional Law* § 12-23, at 702 (1978). *See, e.g., NAACP* v. *Claiborne Hardware Co.*, 458 U.S. at 911; *Citizens Against Rent Control*, 454 U.S. 290; *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Democratic Party of the United States* v. *La Follette*, 450 U.S. 107 (1981); *Buckley*, 424 U.S. at 15; *NAACP* v. *Button*, 371 U.S. 415, 430 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

These guarantees, though not identical, are inseparable. *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). This is because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. at 460; *see, e.g., Citizens Against Rent Control*, 454 U.S. at 295; *Buckley*, 424 U.S. at 15. In the Babel of modern society, the right of association is what amplifies the individual's voice and permits him to be heard. It ensures "that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control*, 454 U.S. at 294.

Thus, the right of association is most sacrosanct where a group or its members are engaging in the advancement of beliefs and ideas, however controversial, *see, e.g., Healy* v. *James*, 408 U.S. 169, 181 (1972); *NAACP* v. *Button*, 371 U.S. at 430-431; *Bates* v. *Little Rock*, 361 U.S. 516, 522-523 (1960); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. at 460, or in political advocacy, *see, e.g., Buckley*, 424 U.S. at 14-15; *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975); *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). "According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 3252 (1984). Indeed, just as freedom of expression extends to vigorous express advocacy, the freedom to associate "encompasses the right to support a candidate of one's choice . . . and to assist in developing support for that candidate." *Morial* v. *Judiciary Comm'n*, 438 F. Supp. 599, 608 (E.D. La. 1977), *rev'd on other grounds*, 565 F.2d 295 (5th Cir.), *cert. denied*, 435 U.S. 1013 (1978).

3. If Construed to Prohibit Dissemination and Distribution by MCFL of Its Newsletter, Section 441b Would Abridge MCFL's and Its Members' Associational Rights.

That the government has taken no direct action to restrict MCFL members in their right to associate hardly ends the inquiry. Decisions of this Court recognize that abridgment of the right of association, like other fundamental rights, may inevitably follow, even though unintended, from varied, and even subtle, forms of government action. *See, e.g., Healy* v. *James*, 408 U.S. 169, 181 (1971); *Bates* v. *Little Rock*, 361 U.S. 516, 523 (1960); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. at 461; L. Tribe, *American Constitutional Law* § 12-23, at 704.

Government cannot interfere with activity integral to association in the sense that the association's protected purposes would be significantly frustrated were the activity disallowed. MCFL's newsletter is such an integral activity. L. Tribe, *American Constitutional Law* § 12-23, at 704. For example, in *Healy* v. *James*, 408 U.S. 169, a college's attempt to prevent an SDS chapter from holding meetings or using the school bulletin board or newspaper was held to violate associational interests because it could only remain a viable entity by communicating with students. The decision would have been no different if SDS had been incorporated.

Similarly, this Court's election law cases indicate that expenditure limitations "impinge on protected associational freedoms," *e.g., Buckley*, 424 U.S. at 22; *FEC* v. *NCPAC*, 105 S. Ct. 1459, because any limitation on independent expenditures "precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recogni-

tion of First Amendment protection of the freedom of association." *Id.* (Citations omitted.)

Such limitations strike at the very reason individuals have joined together:

> One thousand politically motivated persons could each afford to buy a short classified advertisement in one thousand local newspapers; if, however, they join together, pool funds and integrate planning, they can purchase perhaps an advertisement in a national magazine, or a commercial on network television. There can be little doubt that an economy of scale enhances the informational impact of larger units of communication . . .
>
> . . . . To require that contributors . . . literally draft their own television and other public messages is naive. . . . It emasculates the guaranteed right of association to disallow [associations] from organizing and focusing the views of their adherents.

Common Cause v. *Schmitt*, 512 F. Supp. 489, 497 (D.D.C. 1980), *aff'd* 455 U.S. 129 (1982). In *Common Cause* v. *Schmitt*, the court held that there could be no limit upon independent expenditures made by political committees. *See also*, *FEC* v. *NCPAC*, 105 S. Ct. 1459 (expenditure limits on incorporated political action committee unconstitutional). If a limitation "emasculates the guaranteed right of association," clearly the total prohibition upon any expenditure by MCFL emasculates its guaranteed right of association.

Indeed, a restriction on corporate expenditures impinges most heavily on corporations, like MCFL, which incorporate to further the right of association. Justice White, who dissented in *Bellotti*, suggested as much, stating, 435 U.S. at 805:

> Undoubtedly, . . . there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression.

See also id. at 812 n.12.

If § 441b is construed to prohibit the dissemination of MCFL's newspaper, it undercuts an activity integral to MCFL. MCFL was organized for the express purpose of fostering respect for human life and defending the right to life of all human beings "through educational, political and other forms of activity." J.A. 84. From the outset, MCFL and its members have recognized that the newsletter is central to their efforts. J.A. 87-88, 90, 97-98. Moreover, MCFL began publishing the positions of candidates on pro-life issues in response, in part, to numerous inquiries from its members concerning the positions of candidates. J.A. 99. Obviously, prohibiting MCFL from making the types of expenditures at issue here precludes it from effectively amplifying the voice of its adherents.

Finally, at a minimum, § 441b compels MCFL to finance the Special Election Editions through a PAC and as a penalty for exercising its right to speak requires disclosure of the names of MCFL's members. In an analogous situation, the Court of Appeals in *Buckley*, in a part of the decision not appealed to this Court, stated: "[i]t is well established that compelled disclosure of the kind of information section 437a exacts can work a substantial infringement of the associational rights of those whose organizations take public stands on public issues (citations omitted)." *Buckley* v. *Valeo*, 519 F.2d at 872. The section of the Act at issue there required disclosure of the names of contributors where a group published material "'set[ting] forth a candidate's position on any public issue, his voting record, or other official acts' with a design[ ] to influence 'voting at an election'." *Id.* at 870. The Court noted, *id.* at 877:

> Section 437a might, of course, leave open one avenue for groups wishing to maintain the privacy of their contributor lists while discussing public issues:

> they could refrain from mentioning candidates' positions or listing incumbents' voting records. But to do this, the group would have to be extremely careful about mentioning even the names of those who held a particular position on an issue, lest one of them turn out to be a candidate for federal office, thereby triggering § 437a. Such a watered-down and cautious discussion is hardly the "uninhibited, robust and wide-open" debate on public issues which the First Amendment was designed to foster.

(Citations omitted.) Accordingly, the Court held that the statute was unconstitutionally vague and an abridgement of associational rights. *Id.* at 878.

Despite suggestions to the contrary in the FEC's brief, FEC Brief at 35-36, MCFL is not seeking a special privilege in the disclosure arena for ideological corporations. In 1978, as now, if an ideological corporation's primary activity were the advocacy of the election or defeat of candidates — which is not the case with MCFL — it would be a political committee, *Buckley*, 424 U.S. at 79, and the names of contributors of over $200 in the aggregate in a year would have to be disclosed, 2 U.S.C. § 434(b)(3). An ideological corporation which otherwise engaged in express advocacy independent expenditures would be governed by the same regulations affecting individuals and other groups of persons. Disclosure of the expenditure would be required, § 434(e), if it were more than $100. Today that limit is $250, but if $200 is received earmarked for expenditures yet another disclosure report is required. 2 U.S.C. § 434 (c) (1985). The numerous grass roots contributors who buy roses, or make small contributions to a controversial ideological corporation could do so without fear that their names would be disclosed.

C. *Section 441b Impinges on MCFL's and Its Members' Freedom of Press.*

The liberty of the press secured by the First Amendment is not the special province of the traditional "institutional press," but is a fundamental right which comprehends every sort of publication. *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).[25] *See also Branzburg* v. *Hayes*, 408 U.S. 665, 704 (1972); *Schneider* v. *State*, 308 U.S. 147, 164 (1939). There is nothing in the First Amendment's policy or history which turns the application of its protections upon the difference between regular and merely casual or occasional distributions. *United States* v. *CIO*, 335 U.S. at 155 (Rutledge, J., concurring).

Like freedom of speech, freedom of the press is most sacrosanct where it involves comments on the political process.[26] *See, e.g., Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936); *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945).

Thus, if section 441b is construed to prohibit publication and dissemination by MCFL of its newsletters, it impinges on the freedom of press guaranteed to MCFL and its members.

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[25] In *Lowe* v. *SEC*, this Court reaffirmed that the liberty of the press is truly a liberty of publication. *See in particular Lowe*, 105 S. Ct. at 2571, where *Lovell* v. *City of Griffin*, 303 U.S. 444, 4351-452 (1938) is quoted with approval ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.") *See also Bellotti*, 435 U.S. at 799-800 ("The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly and "comprehends every sort of publication which affords a vehicle of information and opinion," per Burger, C.J., concurring).

[26] Indeed, a truly nonpartisan press is foreign to American history. Although at the outset newspapers had been set up merely as auxiliaries to printing establishments, after the American revolution: "[Newspapers] were more and more founded as spokesmen of political parties. This gave a new dignity and a new color to American Journalism." F. L. Mott, *American Journalism — A History of Newspapers in the United States*, 113-114 (1949). During the presidential campaigns of 1796-1797 and 1800, the papers were described as "overrunning with electioneering essays, squibs, and invectives." *Id.* at 121.

Ironically, it would silence a publication more akin to the newspapers circulated at the time the First Amendment was written than the publications now printed by media conglomerates and blessed by the FEC. The newspaper in American history began as a "small sheet, insignificant alike in matter and appearance, published at considerable intervals, and including but few in its visits." T.M. Cooley, *Constitutional Limitations*, 451 (1868). Further, it would chill the activities of numerous other organizations having similar publications. *See* R. 35-111, and S.A., Section C.

D. *Section 441b Does Not Serve a Sufficiently Compelling State Interest to Justify the Substantial Restriction on the First Amendment Rights of MCFL and Its Members.*

1. § 441b Must be Given Strict Security.

The Act cannot avoid strict scrutiny merely because it prohibits expenditures rather than expressly affecting speech. In *Buckley*, the Court held that expenditure limitations are direct and substantial limitations on speech. That holding was reaffirmed in *FEC* v. *NCPAC*, 105 S. Ct. 1459.

Because core First Amendment rights are at stake, the statute is not entitled to the usual presumption of validity afforded to legislation. *See Schneider* v. *State*, 308 U.S. 147, 161 (1939). "The presumption rather is against the legislative intrusion into those domains." *United States* v. *CIO*, 335 U.S. at 140-141 (Rutledge, J. concurring). The cases cited by the FEC do not hold otherwise, *e.g.*, *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94, 103 (1973) ("That is not to say that we 'defer' to the judgment of Congress . . . on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission had not fulfilled its task with appropriate sensitivity to the interests in free expression.") The strict scrutiny standard is applicable because § 441b infringes freedom of speech, association and press, and also because the section is content-based. The constitutionality of § 441b turns on whether the governmental interest advanced by the state in its support can satisfy the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley*, 424 U.S. at 44-45.

2. Section 441b Cannot Survive Strict Scrutiny.

When § 441b is subjected to the rigorous scrutiny required by the Constitution it cannot pass muster. The FEC has advanced the following allegedly significant interests 1) preventing corruption, (FEC Brief 29-31), 2) protecting individuals who have paid money into a corporation from having that money used to support candidates to whom they may be opposed (31-33), and 3) promoting public disclosure of the sources of campaign financing (33-36). These reasons do not add up to a compelling purpose.

a. *Corruption*. The "corruption" to be avoided arises when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *FEC* v. *NCPAC*, 105 S. Ct. 1459. Lobbying by corporations is constitutionally protected. *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Precisely how independent expenditures by corporations can be corrupting but lobbying is not is never explained by the FEC. *See Bellotti*, 435 U.S. at 791-792 n.31.

The interest in avoiding "corruption" may justify restrictions on campaign *contributions* to a candidate. It, however, has a limited application to truly independent expenditures which, by definition, are not prearranged by, or orchestrated with, the candidate. Such lack of coordination undermines the value to the candidate of the expenditures and substantially alleviates the danger that they will be given as a *quid pro quo*. *Buckley*, 424 U.S. at 47. *See Citizens Against Rent Control*, 454 U.S. at 297. Indeed, independent expenditures may well prove "counterproductive" to a candidate's campaign. *Buckley* v.

Valeo, 424 U.S. at 47. (In fact, in 1981 the Chairman of the Republican National Committee complained "anyone who spends money, even a penny, on a campaign, should be responsible to a candidate's party. The independent groups are not responsible to anyone." "GOP Chairman Condemns Negative Ad Campaigns," The Los Angeles Times, April 28, 1981). By publishing its newsletters, MCFL is ensuring that the voters on either side of the abortion issue will be able to make an informed choice and is thereby enhancing the accountability of candidates. *Cf. Brown* v. *Hartlage*, 456 U.S. 45. Since a majority of the population does not agree with MCFL's anti-abortion stance, "[t]o the extent [the newsletter] was distributed beyond defendant's membership, it probably lessened rather than enhanced the prospect of election of candidates subscribing to defendants' [*sic*] platform. . ." J.S. App. 31a. The potential for corruption is limited still further where the expenditure is not only independent, but, as here, public. *Cf. Brown* v. *Hartlage*, 456 U.S. 45.

The FEC's real gripe seems to be with the Court's holdings in *Buckley* and its progeny that expenditures do not lose their highly protected status no matter how large or effective they may be. The notion of equalizing the relative ability of individuals *and groups* to influence the outcome of elections is "wholly foreign" to the First Amendment which protects effective speech no less than ineffective speech, and corporations, as well as individuals. *Id.* at 48-49, 58-59. *See, e.g., Bellotti*, 435 U.S. at 784, 790-791; *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 533 (1980); *NAACP* v. *Button*, 371 U.S. at 428.

Certainly the danger of corruption does not exist, as the Court of Appeals found, in the case of grass roots, nonpartisan, nonprofit issue-oriented corporations such as MCFL where the independent expenditures sought to be proscribed are minimal and went toward the publication of candidates' positions on issues of concern to a large number of voters. MCFL did not have access to vast sums. J.A. 84-85. The total amount spent for the two newsletters at issue was $9,812.00, which, when

divided by the number (492) of candidates listed, represents approximately $20.00 per candidate, hardly a sum which generates concern about corruption. J.A. 101.

Furthermore, although ideological corporations may attract contributions, and, perhaps, raise substantial sums, the expenditure of those sums by such a corporation does not constitute the injection into the political process of vast wealth accumulated for other purposes simply waiting to be unleashed. *Cf. Pipefitters* v. *United States*, 407 U.S. 385, 423 (1972) (citing legislative history to the effect that the purpose of the predecessor of § 441b was to avoid the diversion of "substantial general purpose treasuries" to political purposes); *United States* v. *CIO*, 335 U.S. at 122 (characterizing the congressional purpose as one of strengthening the bars against the misuse of "aggregated funds"). Moneys spent by MCFL are moneys given or raised by individuals who believe in the pro-life cause espoused by MCFL. A candidate will be no more indebted to the organization, MCFL, than to the elements of the constituency whose interests are voiced by that organization. *Cf., e.g., Common Cause* v. *Schmitt*, 512 F. Supp. at 498. As *Bellotti* and *NAACP* v. *Button* make clear, First Amendment protection does not evaporate if individuals acting in association choose to incorporate that association.

On this general topic, it should be apparent that not all entities generating business revenues are corporations. Partnerships, business trusts, joint ventures and the like are capable of producing huge sums from commerce. Conversely, not all corporations generate business revenues, witness MCFL. If sums accumulated by business activity are deemed somehow to be more potentially corrupting than other accumulations, so that they should be kept out of the political arena even as independent expenditures, then Congress should address this problem directly and not resort to short cut methods which catch the sardine with the salmon and even let some salmon escape.

MCFL was engaging in direct political speech, "not the solicitation of contributions from 267,000 individuals as in

FEC v. *NRWC*, 459 U.S. 197, nor 'speech by proxy,' *California Medical Association* v. *FEC*, 453 U.S. 182, 196, n.16 (1981)." J.S. App. 37a. The District Court below stated:

> the defendant's special election editions were the very antithesis of a corrupting agreement or contribution. They were open, strived for accuracy, reported on every candidate regardless of prospects of elections and urged readers to vote on election day. They sought to influence incumbents and candidates solely by means of informed voter reaction to the candidates' positions on an important public issue. Far from being an improper influence, or eroding public confidence in the electoral process, or threatening its integrity, *FEC* v. *NRWC*, *supra* at 207-208, they would seem to promote rather than undermine the honest functioning of representative government.

J.S. App. 37a.

In short, section 441b does not serve a sufficiently important state interest when applied to MCFL and its members.[27] The only interest of potential constitutional significance — the need to prevent corruption or the appearance of corruption — simply is not served by the statute as applied to independent expenditures by grass roots, nonpartisan, nonprofit associations.[28]

[27] Note, contrary to the FEC's argument, *FEC* v. *NRWC*, 459 U.S. 197, does not govern this case. The Court of Appeals rejected such an argument stating; J.S. App. 23a:

> the instant case, unlike *National Right to Work Committee*, involves a corporation's indirect and uncoordinated expenditures in connection with a federal election, not a solicitation for direct contributions to candidates. *See Federal Election Commission* v. *National Conservative Political Action Committee*, 53 U.S.L.W. 4293, 4296 (U.S., March 18, 1985). ('NRWC is consistent with this Court's earlier holding that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates.').

[28] Even if corruption were a danger, section 441b is at once ineffective and over-intrusive. On one hand, the necessity of interpreting the statute to preclude only those communications containing express advocacy undermines its ability to serve the asserted governmental interest. This Court stated as much in *Buckley*, 424 U.S. at 45. Section 441b is also ineffective because it does not purport to reach lobbying — an activity far more susceptible of improper influence of representative decisionmakers. It is also overbroad. The government has not demonstrated, as it must, that its interest (in preventing corruption or the appearance of corruption) cannot be protected adequately by more limited regulation. *See, e.g., Central Hudson Gas & Elect. Corp.* v. *Public Service Commission*, 447 U.S. 557, 565 (1980); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *United States* v. *CIO*, 335 U.S. at 141, 145 (Rutledge, J., concurring).

b. *Protection of Minority Interests*. The FEC is also concerned that contributors to MCFL may have their contributions used to support political candidates to whom they may be opposed. FEC Brief at 31.[29] Laying aside the fact that MCFL did not "support political candidates," it is not clear who the FEC is worried about. Stockholders? There were none. Members? As a non-membership corporation, MCFL apparently had none. There were many people interested enough in the organization to support its goals by buying red roses, making small contributions, and attending dinner dances. As the Court of Appeals stressed, J.S. App. 22-23a:

> contributors to MCFL need not be protected from having their money used for expenditures such as the Special Election Edition. Individuals who contribute to MCFL do so because they support MCFL's anti-abortion position and presumably would favor expenditures for a publication that informs contributors and others of the position of various candidates on the abortion issue.

Contributors who do not like what MCFL is doing with their money can stop contributing; no one is compelled to support

[29] The FEC's solution for the protection of the MCFL contributor who does not wish to support candidates to which he may be opposed is to force MCFL to finance its Special Election Editions through a PAC. However, since the FEC claims that MCFL can completely control its PAC it would appear that contributors to the PAC would be similarly unprotected. In fact this very point was raised by the dissent in *NCPAC*, 105 S. Ct. at 1477-1478. "It can safely be assumed that each contributor does not fully support every one of the variety of activities undertaken and candidates supported by the PAC to which he contributes." (White, J., dissenting.)

MCFL. Since contributors to MCFL do not have another primary economic purpose for their affiliation with MCFL, such as stockholders and union members would have, the interest in protecting the minority, generally at best a "secondary concern," *Cort* v. *Ash*, 422 U.S. 66, 81 (1975), is not implicated.

In any event, MCFL began publishing the Special Election Editions, in part, because of requests from its members. J.A. 99. With the information MCFL provides, voters can decide to vote for candidates on whatever criteria they choose. They may utilize the information to vote solely for pro-life candidates or, if they choose, they can vote for candidates based on their positions on other issues. Without MCFL's publication, voters are *less informed*. MCFL's publication of candidates' positions on pro-life issues provided information which the district court found was "probably not available elsewhere," J.S. App. 32a, and guaranteed each of the newsletter's readers "the opportunity to make a personal decision about the political options he or she will support." FEC Brief, at 32.

c. *Public Disclosure of Sources of Federal Campaign Financing*. Grasping at a final straw, the FEC argues that § 441b is justified by the public interest in disclosure of sources of independent expenditures. By "sources" the FEC presumably means each of MCFL's contributors. The FEC has not bothered to explain why the names of MCFL's contributors must be disclosed other than that disclosure is a "good thing." *Buckley* requires that a disclosure provision be "narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Buckley*, 424 U.S. at 81. It is the government's burden to show that there is some purpose for disclosure, other than for disclosure's sake, particularly where such disclosure will impinge upon associational rights. *Id*. Since contributions to MCFL are made solely to further MCFL's various activities and are not earmarked for any political purpose, it is not likely that a candidate could become indebted to any particular contributor. Any corruption, real or imagined, is avoided. While express advocacy expenditures may bear a

sufficient relationship to a candidate or his campaign to require disclosure, *Buckley*, 424 U.S. at 81, non-earmarked contributions to MCFL are not so "campaign related" that the interest in disclosure outweighs MCFL's and its members' associational interests. *In any event, § 441b is not a disclosure provision*. If Congress wants the names of all contributors to a non-profit corporation which engages in any express advocacy to be made public, it could enact such a statute. Whether such a disclosure statute could survive constitutional scrutiny is not before this Court.

The FEC has not been candid in arguing that the Court of Appeals' decision means that "because it is a corporation, MCFL has a first amendment right to make group political expenditures on behalf of its supporters without the inconvenience of complying with these regulations, while other groups of individuals who have not incorporated do not." FEC Brief at 26. The definition of a political committee encompasses groups under the control of a candidate or the major purpose of which is the nomination or election of a candidate, *see, e.g., Buckley*, 424 U.S. at 79; *United States* v. *National Comm. for Impeachment*, 469 F.2d at 1139-1142, unquestionably not the case for MCFL.[30] *Cf.* A-O 1982-13, 1 Fed. Elec. Camp. Fin. Guide, ¶ 5658 (law partnership which made $1000 contribution not a political committee).

MCFL is subject to the same disclosure provisions as other advocacy organizations which do not primarily advocate the election or defeat of candidates. Persons (other than political committees) are required to identify the source of any contribution they receive exceeding $200 earmarked for "express advocacy" purposes. 2 U.S.C. § 434(c) (1984). Contributions less than $200 are unlikely to lead to the corruption feared by the FEC. MCFL also must file a report whenever it makes an express advocacy expenditure of more than $250. *Id*.

[30] FEC raises for the first time in this Court the hypothetical possibility that MCFL might have been a political committee. In addition to the charge that MCFL had violated § 441b, the FEC also initially investigated a charge that MCFL was a political committee but found at the probable cause stage that it was not — a finding it now apparently wishes it had not made and conveniently forgets to mention. *See* R. 328.

The spectre of business money secretly being funnelled through ideological corporations without public disclosure is a fantasy made possible only by ignoring the rest of the Act and regulations, not to mention the facts of this case since MCFL accepted no corporate contribution. Not only must contributions exceeding $200 be disclosed by the recipient if earmarked for express advocacy, but also § 441b continues, under the FEC's construction of the statute, to prohibit corporate business contributions and expenditures "in connection with any election." Contributions by a business corporation to an ideological corporation to enable the ideological corporation to make expenditures in connection with an election undoubtedly would be deemed by the FEC to violate that provision. The provision requiring disclosure of earmarked contributions answers the FEC's concern that potential violations of the statute by business corporations would go undetected.

And if it is constitutional for the government to prohibit business corporations from making any contributions to a nonprofit group which engages in express advocacy or to prohibit nonprofit ideological corporations which accept corporate contributions from engaging in express advocacy, points which MCFL does not concede, there are certainly other, more direct and narrowly tailored methods of achieving these prohibitions without trampling on the First Amendment rights of nonprofit ideological corporations funded solely by individuals.

E. *Section 441b Is Invalid As An Unconstitutional Denial of Equal Protection of the Laws.*

Section 441b denies MCFL its right to equal protection of the laws as guaranteed by the Fifth Amendment. The due process clause of the Fifth Amendment "yield[s] norms of equal treatment indistinguishable from those of the equal protection clause." L. Tribe, *American Constitutional Law*, § 16-1 at 992. *See, e.g., Buckley*, 424 U.S. at 93. If, as the FEC suggests, the exemption in § 431(f)(4)(A) is a "communications media" exemption, FEC Brief at 7, or a "news media" exemption, FEC Brief at 18, § 441b denies MCFL equal protection of the laws. When the classification is one "affecting First Amendment interests," a strict scrutiny test is applied. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 101 (1972). MCFL's First Amendment rights should be afforded the greatest possible protection because political discussion and the intelligent use of the franchise are at stake. "Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. *See also United States* v. *UAW*, 352 U.S. at 570.

The government's interest in ensuring an election free from corruption or even its arguable interest in protecting contributors against the use of funds for support of or in opposition to candidates are not sufficiently compelling to justify prohibiting MCFL from expending any money to publish its views on candidates while permitting business conglomerates, which publish daily newspapers, to expend unlimited sums of money to express their views.

The institutional press is simply part of the public, and its rights are no greater than the rights of the general public. *See Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 572-573 (1980); *Bellotti*, 435 U.S. at 802 (Burger, C.J., concurring); *Dun & Bradstreet* v. *Greenmoss Builders*, 105 S. Ct. at 2953, 2958 (1985). *See also Buckley*, 424 U.S. at 51 n.50, where the Court recognized that exempting the institutional press from limitations on political expenditures would not have saved the statute from First Amendment attack. Of course, if there were only one established newspaper in a particular area, the effect of treating § 431(f)(4)(A) as a "media" exemption would be to create a monopoly.

If the exemption is a "news media" exemption, § 441b burdens the First Amendment rights of non-media corporations to a greater extent than it burdens those rights for media corporations. None of the compelling purposes cited by the FEC justify this distinction. It does not serve to protect the integrity of the electoral process from the alleged undue influence that could be exerted by aggregations of money accumulated through

the use of the media corporate form. It does not serve to protect individuals whose money goes to make up a media corporation's treasury from having that money used to support political candidates to whom they may be opposed. Such protection would, if anything, appear to be more necessary in the case of a publicly-held media corporation than for a nonprofit ideological corporation. Also, to the extent that the newsletter the FEC seeks to proscribe is public, the electorate is informed about the source of campaign financing. The electorate knows, from reading the newsletter, that it is published by MCFL. It may not know who MCFL's members are but then neither does the electorate know who the *Boston Herald*'s stockholders are. The distinction the FEC proposes does not further a compelling government purpose and, in fact, the FEC has not attempted to proffer one.

In conclusion, § 441b fails to afford the "breathing space" which First Amendment freedoms need to survive. *See NAACP v. Button*, 371 U.S. 415, 433 (1963). It is a sad commentary that even now, in the last two decades of the twentieth century, an ideological organization must struggle with the government of the United States to be able to publish truthfully the positions of candidates for public office on a controversial public issue.

Conclusion.

Appellee MCFL respectfully requests this Court to affirm the Court of Appeals' decision.

Respectfully submitted,

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APPENDIX.

TITLE 2. THE CONGRESS

Chapter 14—Federal Election Campaigns

§ 431. Definitions

When used in this chapter —

(a) "election" means —

(1) a general, special, primary, or runoff election;

(2) a convention or caucus of a political party which has authority to nominate a candidate;

(3) a primary election held for the selection of delegates to a national nominating convention of a political party; and

(4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President;

(b) "candidate" means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, if he has —

(1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, to Federal office; or

(2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

(c) "Federal office" means the office of President or Vice President of the United States; or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

(d) "political committee" means any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

(e) "contribution" —

(1) means a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of —

(A) influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party; or

(B) influencing the result of an election held for the expression of a preference for the nomination of persons for election to the office of President of the United States;

(2) means a written contract, promise, or agreement, whether or not legally enforceable, to make a contribution for such purposes;

(3) means funds received by a political committee which are transferred to such committee from another political committee or other source;

(4) means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose, except that this paragraph shall not apply in the case of legal or accounting services rendered to or on behalf of the national committee of a political party (unless the person paying for such services is a person other than the regular employer of the individual rendering such services), other than services attributable

to activities which directly further the election of a designated candidate or candidates to Federal office, nor shall this paragraph apply in the case of legal or accounting services rendered to or on behalf of a candidate or political committee solely for the purpose of ensuring compliance with the provisions of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 (unless the person paying for such services is a person other than the regular employer of the individual rendering such services), but amounts paid or incurred for such legal or accounting services shall be reported in accordance with the requirements of section 434(b); but

(5) does not include —

(A) the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee;

(B) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities;

(C) the sale of any food or beverage by a vendor for use in a candidate's campaign at a charge less than the normal comparable charge, if such charge for use in a candidate's campaign is at least equal to the cost of such food or beverage to the vendor;

(D) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate;

(E) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee

with respect to a printed slate card or sample ballot, or other printed listing, of three or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or other similar types of general public political advertising;

(F) any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of section 441b would not constitute an expenditure by such corporation or labor organization;

(G) a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business, but such loans —

(i) shall be reported in accordance with the requirements of section 434(b); and

(ii) shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance thereof that each endorser or guarantor bears to the total number of endorsers or guarantors;

(H) a gift, subscription, loan, advance, or deposit of money or anything of value to a national committee of a political party or a State committee of a political party which is specifically designated for the purpose of defraying any cost incurred with respect to the construction or purchase of any office facility which is not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office, except that any such gift, subscription, loan, advance, or deposit of money or anything of value, and any such cost, shall be reported in accordance with section 434(b); or

(I) any honorarium (within the meaning of section 441i); to the extent that the cumulative value of activities by any person on behalf of any candidate under each of clauses (B), (C), and (D) does not exceed $500 with respect to any election;

(f) "expenditure" —

(1) means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for the purpose of —

(A) influencing the nomination for election, or the election, of any person to Federal office, or to the office of Presidential and Vice Presidential elector; or

(B) influencing the results of a primary election held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States;

(2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure;

(3) means the transfer of funds by a political committee to another political committee; but

(4) does not include —

(A) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(B) nonpartisan activity designed to encourage individuals to register to vote, or to vote;

(C) any communication by any membership organization or corporation to its members or stockholders, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any person to Federal office except that the costs incurred by a membership organization, including a labor organization or by a corporation, directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate) shall, if those costs exceed $2,000 per election, be reported to the Commission;

(D) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities if the cumulative value of such activities by such individual on behalf of any candidate do not exceed $500 with respect to any election;

(E) any unreimbursed payment for travel expenses made by an individual who, on his own behalf, volunteers his personal services to a candidate if the cumulative amount for such individual incurred with respect to such candidate does not exceed $500 with respect to any election;

(F) any communication by any person which is not made for the purpose of influencing the nomination for election, or election, of any person to Federal office;

(G) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of three or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or other similar types of general public political advertising;

(H) any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of section 441b, would not constitute an expenditure by such corporation or labor organization;

(I) any costs incurred by a candidate in connection with the solicitation of contributions by such candidate, except that this clause shall not apply with respect to costs incurred by a candidate in excess of an amount equal to 20 percent of the expenditure limitations applicable to such candidate under section 441a(b), but all such costs shall be reported in accordance with section 434(b);

(J) the payment, by any person other than a candidate or political committee, of compensation for legal or accounting services rendered to or on behalf of the national committee of a political party (unless the person paying for such services is a person other than the regular employer of the individual rendering such services), other than services attributable to activities which directly further the election of a

designated candidate or candidates to Federal office, or the payment for legal or accounting services rendered to or on behalf of a candidate or political committee solely for the purpose of ensuring compliance with the provisions of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 (unless the person paying for such services is a person other than the regular employer of the individual rendering such services), but amounts paid or incurred for such legal or accounting services shall be reported under section 434(b); or

(K) a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business, but such loan shall be reported in accordance with section 434(b);

(g) "Commission" means the Federal Election Commission;

(h) "person" means an individual, partnership, committee, association, corporation, labor organization, and any other organization or group of persons;

(i) "State" means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(j) "identification" means —

(1) in the case of an individual, his full name and the full address of his principal place of residence; and

(2) in the case of any other person, the full name and address of such person;

(k) "national committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission;

(l) "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission;

(m) "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office, whose name appears on the election ballot as the candidate of such association, committee, or organization;

(n) "principal campaign committee" means the principal campaign committee designated by a candidate under section 432(e)(1) of this title;

(o) "Act" means the Federal Election Campaign Act of 1971 as amended by the Federal Election Campaign Act Amendments of 1974 and the Federal Election Campaign Act Amendments of 1976;

(p) "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate and which is not made in concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(q) "clearly identified" means that (1) the name of the candidate appears; (2) a photograph or drawing of the candidate appears; or (3) the identity of the candidate is apparent by unambiguous reference.

§ 432. Organization of political committees[1]

(a) *Chairman; treasurer; vacancies; official authorizations.* Every political committee shall have a chairman and a treasurer.

[1] The former Sec. 432(e), "Unauthorized activities; notice," was stricken from the United States Code by P.L. 94-283. Its provisions are now governed by Sec. 441d.

No contribution and no expenditure shall be accepted or made by or on behalf of a political committee at a time when there is a vacancy in the office of chairman or treasurer thereof. No expenditure shall be made for or on behalf of a political committee without the authorization of its chairman or treasurer, or their designated agents.

(b) *Account of contributions; segregated funds.* Every person who receives a contribution in excess of $50 for a political committee shall, on demand of the treasurer, and in any event within 5 days after receipt of such contribution, render to the treasurer a detailed account thereof, including the amount of the contribution and the identification of the person making such contribution, and the date on which received. All funds of a political committee shall be segregated from, and may not be commingled with, any personal funds of officers, members, or associates of such committee.

(c) *Recordkeeping.* It shall be the duty of the treasurer of a political committee to keep a detailed and exact account of —

(1) all contributions made to or for such committee;

(2) the identification of every person making a contribution in excess of $50, and the date and amount thereof and, if a person's contributions aggregate more than $100, the account shall include occupation, and the principal place of business (if any);

(3) all expenditures made by or on behalf of such committee; and

(4) the identification of every person to whom any expenditure is made, the date and amount thereof and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made.

(d) *Receipts; preservation.* It shall be the duty of the treasurer to obtain and keep a receipted bill, stating the particulars, for every expenditure made by or on behalf of a political committee in excess of $100 in amount, and for any such expenditure in a lesser amount, if the aggregate amount of such expenditures to the same person during a calendar year exceeds $100. The treasurer shall preserve all receipted bills and accounts required to be kept by this section for periods of time to be determined by the Commission.

(e) *Principal campaign committee; reports, filing.*

(1) Each individual who is a candidate for Federal office (other than the office of Vice President of the United States) shall designate a political committee to serve as his principal campaign committee. No political committee may be designated as the principal campaign committee of more than one candidate, except that the candidate for the office of President of the United States nominated by a political party may designate the national committee of such political party as his principal campaign committee. Except as provided in the preceding sentence, no political committee which supports more than one candidate may be designated as a principal campaign committee. Any occasional, isolated, or incidental support of a candidate shall not be construed as support of such candidate for purposes of the preceding sentence.

(2) Notwithstanding any other provision of this title, each report or statement of contributions received or expenditures made by a political committee (other than a principal campaign committee) which is required to be filed with the Commission under this title shall be filed instead with the principal campaign committee for the candidate on whose behalf such contributions are accepted or such expenditures are made.

(3) It shall be the duty of each principal campaign committee to receive all reports and statements required to be filed with it under paragraph (2) of this subsection and to compile and file such reports and statements, together with its own reports and statements, with the Commission in accordance with the provisions of this title.

§ 433. Registration of political committees

(a) *Statements of organization.* Each political committee which anticipates receiving contributions or making expenditures during the calendar year in an aggregate amount exceeding $1,000 shall file with the Commission a statement of organization, within 10 days after its organization or, if later, 10 days after the date on which it has information which causes the committee to anticipate it will receive contributions or make expenditures in excess of $1,000. Each such committee in existence at the date of enactment of this Act shall file a statement of organization with the Commission at such time as it prescribes.

(b) *Contents of statements.* The statement of organization shall include —

(1) the name and address of the committee;

(2) the names, addresses, and relationships of affiliated or connected organizations;

(3) the area, scope, or jurisdiction of the committee;

(4) the name, address, and position of the custodian of books and accounts;

(5) the name, address, and position of other principal officers, including officers and members of the finance committee, if any;

(6) the name, address, office sought, and party affiliation of —

(A) each candidate whom the committee is supporting; and

(B) any other individual, if any, whom the committee is supporting for nomination for election, or election, to any public office whatever; or, if the committee is supporting the entire ticket of any party, the name of the party;

(7) a statement whether the committee is a continuing one;

(8) the disposition of residual funds which will be made in the event of dissolution;

(9) a listing of all banks, safety deposit boxes, or other repositories used;

(10) a statement of the reports required to be filed by the committee with State or local officers, and, if so, the names, addresses, and positions of such persons; and

(11) such other information as shall be required by the Commission.

(c) *Information changes; report.* Any change in information previously submitted in a statement of organization shall be reported to the Commission within a 10-day period following the change.

(d) *Disbanding of political committees or contributions and expenditures below prescribed ceiling; notice.* Any committee which, after having filed one or more statements of organization, disbands or determines it will no longer receive contributions or make expenditures during the calendar year in an aggregate amount exceeding $1,000 shall so notify the Commission.

(e) *Committees other than principal campaign committee; filing of reports.* In the case of a political committee which is not a principal campaign committee, reports and notifications required under this section to be filed with

the Commission shall be filed instead with the appropriate principal campaign committee.

§ 434. Reports

(a) *Receipts and expenditures; completion date, exception.*

(1) Except as provided by paragraph (2), each treasurer of a political committee supporting a candidate or candidates for election to Federal office, and each candidate for election to such office, shall file with the Commission reports of receipts and expenditures on forms to be prescribed or approved by it.

The reports referred to in the preceding sentence shall be filed as follows:

(A) (i) In any calendar year in which an individual is a candidate for Federal office and an election for such Federal office is held in such year, such reports shall be filed not later than the 10th day before the date on which such election is held and shall be complete as of the 15th day before the date of such election; except that any such report filed by registered or certified mail must be postmarked not later than the close of the 12th day before the date of such election;

(ii) such reports shall be filed not later than the 30th day after the date of such election and shall be complete as of the 20th day after the date of such election.

(B) In any other calendar year in which an individual is a candidate for Federal office, such reports shall be filed after December 31 of such calendar year, but not later than January 31 of the following calendar year and shall be complete as of the close of the calendar year with respect to which the report is filed.

(C) Such reports shall be filed not later than the 10th day following the close of any calendar quarter in which the candidate or political committee concerned received contributions in excess of $1,000, or made expenditures in excess of $1,000, and shall be complete as of the close of such calendar quarter: except that any such report required to be filed after December 31 of any calendar year with respect to which a report is required to be filed under subparagraph (B) shall be filed as provided in such subparagraph. In any year in which a candidate is not on the ballot for election to Federal office, such candidate and his authorized committees shall only be required to file such reports not later than the 10th day following the close of any calendar quarter in which the candidate and his authorized committees received contributions or made expenditures, or both, the total amount of which, taken together, exceeds $5,000, and such reports shall be complete as of the close of such calendar quarter; except that any such report required to be filed after December 31 of any calendar year with respect to which a report is required to be filed under subparagraph (B) shall be filed as provided in such subparagraph.

(D) When the last day for filing any quarterly report required by subparagraph (C) occurs within 10 days of an election, the filing of such quarterly report shall be waived and superseded by the report required by subparagraph (A)(i).

Any contribution of $1,000 or more received after the 15th day, but more than 48 hours, before any election shall be reported within 48 hours after its receipt.

(2) Each treasurer of a political committee authorized by a candidate to raise contributions or make expenditures on his behalf, other than the candidate's principal cam-

paign committee, shall file the reports required under this section with the candidate's principal campaign committee.

(3) Upon a request made by a Presidential candidate or a political committee which operates in more than one State, or upon its own motion, the Commission may waive the reporting dates set forth in paragraph (1) (other than the reporting date set forth in paragraph (1)(B)), and require instead that such candidate or political committee file reports not less frequently than monthly. The Commission may not require a Presidential candidate or a political committee operating in more than one State to file more than 12 reports (not counting any report referred to in paragraph (1)(B)) during any calendar year. If the Commission acts on its own motion under this paragraph with respect to a candidate or a political committee, such candidate or committee may obtain judicial review in accordance with the provisions of chapter 7 of Title 5, United States Code.

(b) *Contents of reports*. Each report under this section shall disclose —

(1) the amount of cash on hand at the beginning of the reporting period;

(2) the full name and mailing address (occupation and the principal place of business, if any) of each person who has made one or more contributions to or for such committee or candidate (including the purchase of tickets for events such as dinners, luncheons, rallies, and similar fundraising events) within the calendar year in an aggregate amount or value in excess of $100, together with the amount and date of such contributions;

(3) the total sum of individual contributions made to or for such committee or candidate during the reporting period and not reported under paragraph (2);

(4) the name and address of each political committee or candidate from which the reporting committee or the candidate received, or to which that committee or candidate made, any transfer of funds, together with the amounts and dates of all transfers;

(5) each loan to or from any person within the calendar year in an aggregate amount or value in excess of $100, together with the full names and mailing addresses (occupations and the principal places of business, if any) of the lender, endorsers, and guarantors, if any, the date and amount of such loans;

(6) the total amount of proceeds from —

(A) the sale of tickets to each dinner, luncheon, rally, and other fundraising event;

(B) mass collections made at such events; and

(C) sales of items such as political campaign pins, buttons, badges, flags, emblems, hats, banners, literature, and similar materials;

(7) each contribution, rebate, refund, or other receipt in excess of $100 not otherwise listed under paragraphs (2) through (6);

(8) the total sum of all receipts by or for such committee or candidate during the reporting period, together with total receipts less transfers, between political committees which support the same candidate and which do not support more than one candidate;

(9) the identification of each person to whom expenditures have been made by such committee or on behalf of such committee or candidate within the calendar year in an aggregate amount or value in excess of $100, the amount, date, and purpose of each such expenditure and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made;

(10) the identification of each person to whom an expenditure for personal services, salaries, and reimbursed

expenses in excess of $100 has been made, and which is not otherwise reported, including the amount, date, and purpose of such expenditure;

(11) the total sum of expenditures made by such committee or candidate during the calendar year, together with total expenditures less transfers between political committees which support the same candidate and which do not support more than one candidate;

(12) the amount and nature of debts and obligations owed by or to the committee, in such form as the Commission may prescribe and a continuous reporting of their debts and obligations after the election at such periods as the Commission may require until such debts and obligations are extinguished, together with a statement as to the circumstances and conditions under which any such debt or obligation is extinguished and the consideration therefor;

(13) in the case of an independent expenditure in excess of $100 by a political committee, other than an authorized committee of a candidate, expressly advocating the election or defeat of a clearly identified candidate, through a separate schedule (a) any information required by paragraph (9) stated in a manner which indicates whether the independent expenditure involved is in support of, or in opposition to, a candidate; and (b) under penalty of perjury, a certification whether such independent expenditure is made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(14) such other information as shall be required by the Commission.

When committee treasurers and candidates show that best efforts have been used to obtain and submit the information required by this subsection, they shall be deemed to be in compliance with this subsection.

(c) *Cumulative reports for calendar year; amounts for unchanged items carried forward; statement of inactive status.* The reports required to be filed by subsection (a) of this section, shall be cumulative during the calendar year to which they relate, but where there has been no change in a item reported in a previous report during such year, only the amount need be carried forward. If no contributions or expenditures have been accepted or expended during a calendar year, the treasurer of the political committee or candidate shall file a statement to that effect.

(d) *Members of Congress, reporting exemption.* This section does not require a Member of the Congress to report, as contributions received or as expenditures made, the value of photographic, matting, or recording services furnished to him by the Senate Recording Studio, the House Recording Studio, or by an individual whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives and who furnishes such services as his primary duty as an employee of the Senate or House of Representatives, or if such services were paid for by the Republican or Democratic Senatorial Campaign Committee, the Democratic National Congressional Committee, or the National Republican Congressional Committee. This subsection does not apply to such record services furnished during the calendar year before the year in which the Member's term expires.

(e) *Contributions or expenditures by person other than political committee or candidate.*

(1) Every person (other than a political committee or candidate) who makes contributions or independent expenditures expressly advocating the election or defeat of a clearly identified candidate, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 during a calendar year

shall file with the Commission, on a form prepared by the Commission, a statement containing the information required of a person who makes a contribution in excess of $100 to a candidate or political committee and the information required of a candidate or political committee receiving such a contribution.

(2) Statements required by this subsection shall be filed on the dates on which reports by political committees are filed. Such statements shall include (A) the information required by subsection (b)(9), stated in a manner indicating whether the contribution or independent expenditure is in support of, or opposition to, the candidate; and (B) under penalty of perjury, a certification whether such independent expenditure is made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate. Any independent expenditure, including those described in subsection (b)(13), of $1,000 or more made after the 15th day, but more than 24 hours, before any election shall be reported within 24 hours of such independent expenditure.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all expenditures separately, including those reported under subsection (b)(13), made with respect to each candidate, as reported under this subsection, and for periodically issuing such indices on a timely pre-election basis.

§ 435. Requirements relating to campaign advertising

(a) No person who sells space in a newspaper or magazine to a candidate, or to the agent of a candidate, for use in connection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.

(b) Each political committee shall include on the face or front page of all literature and advertisements soliciting contributions the following notice:

"A copy of our report is filed with the Federal Election Commission and is available for purchase from the Federal Election Commission, Washington, D.C."

§ 436. Forma! requirements respecting reports and statements

(a) *Copy; preservation*. A copy of a report or statement shall be preserved by the person filing it for a period of time to be designated by the Commission in a published regulation.

(b) *Waiver of reporting requirements*. The Commission may, by a rule of general applicability which is published in the Federal Register not less than 30 days before its effective date, relieve —

(1) any category of candidates of the obligation to comply personally with the reporting requirements of section 434 of this title, if it determines that such action is consistent with the purposes of this Act; and

(2) any category of political committees of the obligation to comply with the reporting requirements of such section if such committees —

(A) primarily support persons seeking State or local office; and

(B) do not operate in more than one State or do not operate on a statewide basis.

(c) *Debts, pledges, etc.; separate schedules; aggregate amounts based upon actual payment*. The Commission shall,

by published regulations of general applicability, prescribe the manner in which contributions and expenditures in the nature of debts and other contracts, agreements, and promises to make contributions or expenditures shall be reported. Such regulations shall provide that they be reported in separate schedules. In determining aggregate amounts of contributions and expenditures, amounts reported as provided in such regulations shall not be considered until actual payment is made.

(d) *Postmark as date of filing*. If a report or statement required by sections 433, 434(a)(1)(A)(ii), 434(a)(1)(B), 434(a)(1)(C), 434(c), or 434(e) of this title to be filed by a treasurer of a political committee or by a candidate or by any other person, is delivered by registered or certified mail, to the Commission or principal campaign committee with which it is required to be filed, the United States postmark stamped on the cover of the envelope or other container in which such report or statement is so mailed shall be deemed to be the date of filing.

§ 437. Reports on convention financing

Each committee or other organization which —

(1) represents a State, or a political subdivision thereof, or any group of persons, in dealing with officials of a national political party with respect to matters involving a convention held in such State or political subdivision to nominate a candidate for the office of President or Vice President, or

(2) represents a national political party in making arrangements for the convention of such party held to nominate a candidate for the office of President or Vice President, shall within 60 days following the end of the convention (but not later than 20 days prior to the date on

which Presidential and Vice Presidential electors are chosen), file with the Federal Election Commission a full and complete financial statement, in such form and detail as it may prescribe, of the sources from which it derived its funds, and the purposes for which such funds were expended.

§ 437b. Campaign depositories[2]

(a) (1) Each candidate shall designate one or more national or State banks as his campaign depositories. The principal campaign committee of such candidate, and any other political committee authorized by him to receive contributions or to make expenditures on his behalf, shall maintain a single checking account and such other accounts as the committee determines to maintain at its discretion at a depository designated by the candidate and shall deposit any contributions received by such committee into such account. A candidate shall deposit any payment received by him under chapter 95 or chapter 96 of Title 26 of the United States Code in the account maintained by his principal campaign committee. No expenditure may be made by any such committee on behalf of a candidate or to influence his election except by check drawn on such account, other than petty cash expenditures as provided in subsection (b).

(2) The treasurer of each political committee (other than a political committee authorized by a candidate to receive contributions or to make expenditures on his behalf) shall designate one or more national or State banks as campaign depositories of such committee, and shall maintain a checking account for the committee at each such depository. All

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[2] Sec. 437a, "Reports by Certain Persons," was stricken from the United States Code by P.L. 94-283.

contributions received by such committee be deposited in such accounts. No expenditure may be made by such committee except by check drawn on such accounts, other than petty cash expenditures as provided in subsection (b).

(b) A political committee may maintain a petty cash fund out of which it may make expenditures not in excess of $100 to any person in connection with a single purchase or transaction. A record of petty cash disbursements shall be kept in accordance with requirements established by the Commission, and such statements and reports thereof shall be furnished to the Commission as it may require.

(c) A candidate for nomination for election, or for election, to the office of President of the United States may establish one such depository in each State, which shall be considered as his campaign depository for such State by his principal campaign committee and any other political committee authorized by him to receive contributions or to make expenditures on his behalf in such State, under rules prescribed by the Commission. The campaign depository of the candidate of a political party for election to the office of Vice President of the United States shall be the campaign depository designated by the candidate of such party for election to the office of President of the United States.

§ 437c. Federal Election Commission

(a) (1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives, ex officio and without the right to vote, and six members appointed by the President of the United States, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

(2) (A) Members of the Commission shall serve for terms of 6 years, except that of the members first appointed —

(i) Two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977;

(ii) Two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; and

(iii) Two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981.

(B) A member of the Commission may serve on the Commission after the expiration of his term until his successor has taken office as a member of the Commission.

(C) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he succeeds.

(D) Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

(3) Members shall be chosen on the basis of their maturity, experience, integrity, impartiality, and good judgment and shall be chosen from among individuals who, at the time of their appointment, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Government of the United States. Members of the Commission shall not engage in any other business, vocation, or employment. Any individual who is engaging in any other business, vocation, or employment at the time such individual begins to serve as a member of the Commission shall terminate or liquidate such activity no later than 1 year after beginning to serve as such a member.

(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives)

shall receive compensation equivalent to the compensation paid at level IV of the executive schedule (5 U.S.C. § 5315).

(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of 1 year. No member may serve as chairman more often than once during any term of office to which he is appointed. The chairman and the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman, or in the event of a vacancy in such office.

(b) (1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954. The Commission shall have exclusive primary jurisdiction with respect to the civil enforcement of such provisions.

(2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.

(c) All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this title shall be made by a majority vote of the members of the Commission except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to establish guidelines for compliance with the provisions of this Act or with chapter 95 or chapter 96 of the Internal Revenue Code of 1954, or for the Commission to take any action in accordance with paragraph (6), (7), (8), or (10) of section 437d(a). A member of the Commission may not delegate to any person his vote or any decision-making authority or duty vested in the Commission by the provisions of this title.

(d) The Commission shall meet at least once each month and also at the call of any member.

(e) The Commission shall prepare written rules for the conduct of its activities, shall have an official seal which shall be judicially noticed, and shall have its principal office in or near the District of Columbia (but it may meet or exercise any of its powers anywhere in the United States).

(f) (1) The Commission shall have a staff director and a general counsel who shall be appointed by the Commission. The staff director shall be paid at a rate not to exceed the rate of basic pay in effect for level IV of the executive schedule (5 U.S.C. § 5315). The general counsel shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the executive schedule (5 U.S.C. § 5316). With the approval of the Commission, the staff director may appoint and fix the pay of such additional personnel as he considers desirable without regard to the provisions of Title 5, United States Code, governing appointments in the competitive service.

(2) With the approval of the Commission, the staff director may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of Title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-15 of the general schedule (5 U.S.C. § 5332).

(3) In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities of other agencies and departments of the United States Government. The heads of such agencies and departments may make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

Editorial Note; Transition Provisions: Section 101 of the "Federal Election Campaign Act Amendments of 1976," P.L. 94-

283, contains the following transition provisions relating to the Federal Election Commission.

"(e) (1) The President shall appoint members of the Federal Election Commission under section 437c(a), as amended by this section, as soon as practicable after the date of the enactment of this Act.

(2) The first appointments made by the President under section 437c(a), as amended by this section, shall not be considered to be appointments to fill the unexpired terms of members serving on the Federal Election Commission on the date of the enactment of this Act.

(3) Members serving on the Federal Election Commission on the date of the enactment of this Act may continue to serve as such members until new members are appointed and qualified under section 437c(a), as amended by this section, except that until appointed and qualified under this Act, members serving on such Commission on such date of enactment may, beginning on March 23, 1976, exercise only such powers and functions as may be consistent with the determinations of the Supreme Court of the United States in Buckley et al. against Valeo, Secretary of the United States Senate, et al. (numbered 75-436, 75-437) January 30, 1976.

(f) The provisions of section 437c(a)(3), which prohibit any individual from being appointed as a member of the Federal Election Commission who is, at the time of his appointment, an elected or appointed officer or employee of the executive, legislative, or judicial branch of the Federal Government, shall not apply in the case of any individual serving as a member of such Commission on the date of the enactment of this Act.

"(g) (1) All personnel, liabilities, contracts, property, and records determined by the Director of the Office of Management and Budget to be employed, held, or used primarily in connection with the functions of the Federal Election Commission under Title III of the Act as such title existed on January 1, 1976, or under any other provision of law, are transferred to such Commission as constituted under the amendments made by this Act to the Federal Election Campaign Act of 1971.

(2) (A) Except as provided in subparagraph (B), personnel engaged in functions transferred under paragraph (1) shall be transferred in accordance with applicable laws and regulations relating to the transfer of functions.

(B) The transfer of personnel pursuant to paragraph (1) shall be without reduction in classification or compensation for 1 year after such transfer.

(3) All laws relating to the functions transferred under this Act shall, insofar as such laws are applicable and not amended by this Act, remain in full force and effect. All orders, determinations, rules, and opinions made, issued, or granted by the Federal Election Commission before its reconstitution under the amendments made by this Act which are in effect at the time of the transfer provided by paragraph (1), and which are consistent with the amendments made by this Act, shall continue in effect to the same extent as if such transfer had not occurred. Any rule or regulation proposed by such Commission before the date of the enactment of this Act shall be prescribed by such Commission only if, after such date of enactment, the rule or regulation is submitted to the Senate or the House of Representatives, as the case may be,

"in accordance with the provisions of section 438(c), and it is not disapproved by the appropriate House of the Congress.

(4) The provisions of this Act shall not affect any proceeding pending before the Federal Election Commission on the date of the enactment of this Act.

(5) No suit, action, or other proceeding commenced by or against the Federal Election Commission or any officer or employee thereof acting in his official capacity shall abate by reason of the transfer made under paragraph (1). The court before which such suit, action, or other proceeding is pending may, on motion or supplemental petition filed at any time within 12 months after the date of the enactment of this Act, allow such suit, action, or other proceeding to be maintained against the Federal Election Commission if the party making the motion or filing the petition shows a necessity for the survival of the suit, action, or other proceeding to obtain a settlement of the question involved.

(6) Any reference in any other Federal law to the Federal Election Commission, or to any member or employee thereof, as such Commission existed under the Federal Election Campaign Act of 1971 before its amendment by this Act shall be held and considered to refer to the Federal Election Commission, or the members or employees thereof, as such Commission exists under the Federal Election Campaign Act of 1971 as amended by this Act."

§ 437d. Powers of Commission

(a) The Commission has the power —

(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe; and such submission

shall be made within such a reasonable period of time and under oath or otherwise as the Commission may determine;

(2) to administer oaths or affirmations;

(3) to require by subpoena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3) of this subsection;

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g(a)(9)), or appeal any civil action in the name of the Commission for the purpose of enforcing the provisions of this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954, through its general counsel;

(7) to render advisory opinions under section 437f of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, United States Code, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954;

(9) to formulate general policy with respect to the administration of this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954; and

(10) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

(b) Any United States district court within the jurisdiction of which any inquiry is carried on, may, upon petition by the Commission, in case of refusal to obey a subpoena or order of the Commission issued under subsection (a) of this section, issue an order requiring compliance therewith. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(c) No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

(d) (1) Whenever the Commission submits any budget estimate or request to the President of the United States or the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation, requested by the Congress or by any Member of the Congress, to the President of the United States or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress or to the member requesting the same. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation, to any office or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(e) Except as provided in section 437g(a)(9), the power of the Commission to initiate civil actions under subsection (a)(6) shall be the exclusive civil remedy for the enforcement of the provisions of this Act.

§ 437e. Reports

The Commission shall transmit reports to the President of the United States and to each House of the Congress no later than March 31 of each year. Each such report shall contain a detailed statement with respect to the activities of the Commission in carrying out its duties under this title, together with recommendations for such legislative or other action as the Commission considers appropriate.

§ 437f. Advisory opinions

(a) The Commission shall render an advisory opinion, in writing, within a reasonable time in response to a written request by any individual holding Federal office, any candidate for Federal office, any political committee, or the national committee of any political party concerning the application of a general rule of law stated in the Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954, or a general rule of law prescribed as a rule or regulation by the Commission, to a specific factual situation. Any such general rule of law not stated in the Act or in chapter 95 or chapter 96 of the Internal Revenue Code of 1954 may be initially proposed by the Commission only as a rule or regulation pursuant to the procedures established by section 438(c). No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(b) (1) Notwithstanding any other provision of law, any person who relies upon any provision or finding of an advisory

opinion in accordance with the provisions of paragraph (2) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

(2) Any advisory opinion rendered by the Commission under subsection (a) may be relied upon by (a) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and (b) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(c) Any request made under subsection (a) shall be made public by the Commission. The Commission shall before rendering an advisory opinion with respect to such request, provide any interested party with an opportunity to transmit written comments to the Commission with respect to such request.

Editorial Note; Transition: Section 108(b) of the "Federal Election Campaign Act Amendments of 1976," P.L. 94-283, contains the following transition provision relating to advisory opinions.

"The Commission shall, no later than 90 days after the date of the enactment of this Act, conform the advisory opinions issued before such date of enactment to the requirements established by section 437f(a), as amended. The provisions of section 437f(b), as amended, shall apply with respect to all advisory opinions issued before the date of the enactment of this Act as conformed to meet the requirements of section 437f(a), as amended."

§ 437g. Enforcement

(a) (1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred may file a complaint with the Commission. Such complaint shall be in writing, shall be signed and sworn to by the person filing such complaint, and shall be notarized. Any person filing such a complaint shall be subject to the provisions of section 1001 of Title 18, United States Code. The Commission may not conduct any investigation under this section, or take any other action under this section, solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) The Commission upon receiving any complaint under paragraph (1), and if it has reason to believe that any person has committed a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, or, if the Commission, on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, has reason to believe that such a violation has occurred, shall notify the person involved of such alleged violation and shall make an investigation of such alleged violation in accordance with the provisions of this section.

(3) (A) Any investigation under paragraph (2) shall be conducted expeditiously and shall include an investigation, conducted in accordance with the provisions of this section of reports and statements filed by any complainant under this title, if such complainant is a candidate.

(B) Any notification or investigation made under paragraph (2) shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(4) The Commission shall afford any person who receives notice of an alleged violation under paragraph (2), a reasonable opportunity to demonstrate that no action should be taken against such person by the Commission under this Act.

(5) (A) If the Commission determines that there is reasonable cause to believe that any person has committed or is about to commit a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, the Commission shall make every endeavor for a period of not less than 30 days to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with the person involved, except that, if the Commission has reasonable cause to believe that —

(i) any person has failed to file a report required to be filed under section 434(a)(1)(C) for the calendar quarter occurring immediately before the date of a general election;

(ii) any person has failed to file a report required to be filed no later than 10 days before an election; or

(iii) on the basis of a complaint filed less than 45 days but more than 10 days before an election, any person has committed a knowing and willful violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954;

the Commission shall make every effort, for a period of not less than one-half the number of days between the date upon which the Commission determines there is reasonable cause to believe such a violation has occurred and the date of the election involved, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with the person involved. A conciliation agreement, unless violated, shall constitute a complete bar to

any further action by the Commission, including the bringing of a civil proceeding under subparagraph (B).

(B) If the Commission is unable to correct or prevent any such violation by such informal methods, the Commission may, if the Commission determines there is probable cause to believe that a violation has occurred or is about to occur, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to the amount of any contribution or expenditure involved in such violation, in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(C) In any civil action instituted by the Commission under subparagraph (B), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to the amount of any contribution or expenditure involved in such violation, upon a proper showing that the person involved has engaged or is about to engage in a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

(D) If the Commission determines that there is probable cause to believe that a knowing and willful violation subject to and as defined in section 441j, or a knowing and willful violation of a provision of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitation set forth in subparagraph (A).

(6) (A) If the Commission believes that there is clear and convincing proof that a knowing and willful violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has been committed, a conciliation agreement entered into by the Commission under paragraph (5)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which shall not exceed the greater of (i) $10,000; or (ii) an amount equal to 200 percent of the amount of any contribution or expenditure involved in such violation.

(B) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has been committed, a conciliation agreement entered into by the Commission under paragraph (5)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of (i) $5,000; or (ii) an amount equal to the amount of the contribution or expenditure involved in such violation.

(C) The Commission shall make available to the public (i) the results of any conciliation attempt, including any conciliation agreement entered into by the Commission; and (ii) any determination by the Commission that no violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred.

(7) In any civil action for relief instituted by the Commission under paragraph (5), if the court determines that the Commission has established through clear and convincing proof that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, the court may impose a civil penalty of not more than the greater of (a) $10,000; or (b) an amount equal to 200

percent of the contribution or expenditure involved in such violation. In any case in which such person has entered into a conciliation agreement with the Commission under paragraph (5)(A), the Commission may institute a civil action for relief under paragraph (5) if it believes that such person has violated any provision of such conciliation agreement. In order for the Commission to obtain relief in any such civil action, it shall be sufficient for the Commission to establish that such person has violated, in whole or in part, any requirement of such conciliation agreement.

(8) In any action brought under paragraph (5) or paragraph (7), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(9) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure on the part of the Commission to act on such complaint in accordance with the provisions of this section within 90 days after the filing of such complaint, may file a petition with the United States District Court for the District of Columbia.

(B) The filing of any petition under subparagraph (A) shall be made —

(i) in the case of the dismissal of a complaint by the Commission, no later than 60 days after such dismissal; or

(ii) in the case of a failure on the part of the Commission to act on such complaint, no later than 60 days after the 90-day period specified in subparagraph (A).

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the action, or the failure to act, is contrary to law and may direct the Commission to proceed in conformity with such declaration within 30 days, failing which the complainant may bring in his own name a civil action to remedy the violation involved in the original complaint.

(10) The judgment of the district court may be appealed to the court of appeals and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28, United States Code.

(11) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(12) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (5) it may petition the court for an order to adjudicate such person in civil contempt, except that if it believes the violation to be knowing and willful it may petition the court for an order to adjudicate such person in criminal contempt.

(b) In any case in which the Commission refers an apparent violation to the Attorney General, the Attorney General shall respond by report to the Commission with respect to any action taken by the Attorney General regarding such apparent violation. Each report shall be transmitted no later than 60 days after the date the Commission refers any apparent violation, and at the close of every 30-day period thereafter until there is final disposition of such apparent violation. The Commission may from time to time prepare and publish reports on the status of such referrals.

(c) Any member of the Commission, any employee of the Commission, or any other person who violates the provisions of subsection (a)(3)(B) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subsection (a)(3)(B) shall be fined not more than $5,000.

§ 437h. Judicial review.

(a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

§ 438. Administrative and judicial provisions

(a) *Duties*. It shall be the duty of the Commission —

(1) *Forms*. To develop and furnish to the person required by the provisions of this Act prescribed forms for the making of the reports and statements required to be filed with it under this chapter;

(2) *Manual for uniform bookkeeping and reporting methods*. To prepare, publish, and furnish to the person required to file such reports and statements a manual setting forth recommended uniform methods of bookkeeping and reporting;

(3) *Filing, coding, and cross-indexing system.* To develop a filing, coding, and cross-indexing system consonant with the purposes of this chapter;

(4) *Public inspection; copies; sale or use restrictions.* To make the reports and statements filed with it available for public inspection and copying, commencing as soon as practicable but not later than the end of the second day following the day during which it was received, and to permit copying of any such report or statement by hand or by duplicating machine, as requested by any person, at the expense of such person: *Provided,* That any information copied from such reports and statements shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose;

(5) *Preservation of reports and statements.* To preserve such reports and statements for a period of 10 years from date of receipt, except that reports and statements relating solely to candidates for the House of Representatives shall be preserved for only 5 years from the date of receipt;

(6) *Index of reports and statements; publication in Federal Register.* To compile and maintain a cumulative index of reports and statements filed with it, which shall be published in the Federal Register at regular intervals and which shall be available for purchase directly or by mail for a reasonable price; and to compile and maintain a separate cumulative index of reports and statements filed with it by political committees supporting more than one candidate, which shall include a listing of the date of the registration of any such political committee and the date upon which any such political committee qualifies to make expenditures under section 441a(a)(2), and which shall be revised on the same basis and at the same time as the other cumulative indices required under this paragraph.

(7) *Special reports; publication.* To prepare and publish from time to time special reports listing those candidates for whom reports were filed as required by this title and those candidates for whom such reports were not filed as so required;

(8) *Audits; investigations.* To make from time to time audits and field investigations with respect to reports and statements filed under the provisions of this chapter, and with respect to alleged failures to file any report or statement required under the provisions of this chapter, and to give priority to auditing and field investigating of the verification for, and the receipt and use of, any payments received by a candidate under chapter 95 or chapter 96 of the Internal Revenue Code of 1954;

(9) *Enforcement authorities; reports of violations.* To report apparent violations of law to the appropriate law enforcement authorities; and

(10) *Rules and regulations.* To prescribe rules and regulations to carry out the provisions of this chapter, in accordance with the provisions of subsection (c).

(b) *Commission; duties; national clearinghouse for information; studies, scope, publication, copies to general public at cost.* It shall be the duty of the Commission to serve as a national clearinghouse for information in respect to the administration of elections. In carrying out its duties under this subsection, the Commission shall enter into contracts for the purpose of conducting independent studies of the administration of elections. Such studies shall include, but shall not be limited to, studies of —

(1) the method of selection of, and the type of duties assigned to, officials and personnel working on boards of elections;

(2) practices relating to the registration of voters; and

(3) voting and counting methods.

Studies made under this subsection shall be published by the Commission and copies thereof shall be made available to the general public upon the payment of the cost thereof.

(c) *Review of regulations.*

(1) The Commission, before prescribing any rule or regulation under this section, shall transmit a statement with respect to such rule or regulation to the Senate or the House of Representatives, as the case may be, in accordance with the provisions of this subsection. Such statement shall set forth the proposed rule or regulation and shall contain a detailed explanation and justification of such rule or regulation.

(2) If the appropriate body of the Congress which receives a statement from the Commission under this subsection does not, through appropriate action, disapprove the proposed rule or regulation set forth in such statement no later than 30 legislative days after receipt of such statement, then the Commission may prescribe such rule or regulation. In the case of any rule or regulation proposed to deal with reports or statements required to be filed under this title by a candidate for the office of President of the United States, and by political committees supporting such a candidate both the Senate and the House of Representatives shall have the power to disapprove such proposed rule or regulation. Whenever a committee of the House of Representatives reports any resolution relating to any such rule or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. The Commission may not prescribe any rule or regulation which is disapproved under this paragraph.

(3) If the Commission proposes to prescribe any rule or regulation dealing with reports or statements required to be filed under this title by a candidate for the office of Senator, and by political committees supporting such candidate, it shall transmit such statement to the Senate. If the Commission proposes to prescribe any rule or regulation dealing with reports or statements required to be filed under this title by a candidate for the office of Representative, Delegate, or Resident Commissioner, and by political committees supporting such candidate, it shall transmit such statement to the House of Representatives. If the Commission proposes to prescribe any rule or regulation dealing with reports or statements required to be filed under this title by a candidate for the office of President of the United States, and by political committees supporting such candidate it shall transmit such statement to the House of Representatives and the Senate.

(4) For purposes of this subsection, the term "legislative days" does not include, with respect to statements transmitted to the Senate, any calendar day on which the Senate is not in session, and with respect to statements transmitted to the House of Representatives, any calendar day on which the House of Representatives is not in session, and with respect to statements transmitted to both such bodies, any calendar day on which both Houses of the Congress are not in session.

(5) For purposes of this subsection, the term "rule or regulation" means a provision or series of interrelated provisions stating a single separable rule of law.

(d) *Rules and regulations; Congressional cooperation.*

(1) The Commission shall prescribe suitable rules and regulations to carry out the provisions of this title, including such rules and regulations as may be necessary to require that —

(A) reports and statements required to be filed under this title by a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, and by political committees supporting such candidate, shall be received by the Clerk of the House of Representatives as custodian for the Commission;

(B) reports and statements required to be filed under this title by a candidate for the office of Senator, and by political committees supporting such candidate, shall be received by the Secretary of the Senate as custodian for the Commission; and

(C) the Clerk of the House of Representatives and the Secretary of the Senate, as custodians for the Commission, each shall make the reports and statements received by him available for public inspection and copying in accordance with paragraph (4) of subsection (a), and preserve such reports and statements in accordance with paragraph (5) of subsection (a).

(2) It shall be the duty of the Clerk of the House of Representatives and the Secretary of the Senate to cooperate with the Commission in carrying out its duties under this Act and to furnish such services and facilities as may be required in accordance with this section.

§ 439. Statements filed with State officers

(a) *"Appropriate State" defined*. A copy of each statement required to be filed with the Commission by this chapter shall be filed with the Secretary of State (or, if there is no office of Secretary of State, the equivalent State officer) of the appropriate State. For purposes of this subsection, the term "appropriate State" means —

(1) for reports relating to expenditures and contributions in connection with the campaign for nomination for election, or election, of a candidate to the office of President or Vice President of the United States, each State in which an expenditure is made by him or on his behalf, and

(2) for reports relating to expenditures and contributions in connection with the campaign for nomination for election, or election, of a candidate to the office of Senator or Representative, or Delegate or Resident Commissioner to, the Congress of the United States, the State in which he seeks election.

(b) *Duties of State officers*. It shall be the duty of the Secretary of State, or the equivalent State officer, under subsection (a) of this section —

(1) to receive and maintain in an orderly manner all reports and statements required by this chapter to be filed with him;

(2) to preserve such reports and statements for a period of 10 years from date of receipt, except that reports and statements relating solely to candidates for the House of Representatives shall be preserved for only 5 years from the date of receipt;

(3) to make the reports and statements filed with him available for public inspection and copying during regular office hours, commencing as soon as practicable but not later than the end of the day during which it was received, and to permit copying of any such report or statement by hand or by duplicating machine, requested by any person, at the expense of such person; and

(4) to compile and maintain a current list of all statements or parts of statements pertaining to each candidate.

§ 439a. Use of contributed amounts for certain purposes

Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his activities as a holder of Federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred by him in connection with his duties as a holder of Federal office, may be contributed by him to any organization described in section 170(c) of Title 26 of the U.S. Code, or may be used for any other lawful purpose. To the extent any such contribution, amount contributed, or expenditure thereof is not otherwise required to be disclosed under the provisions of this title, such contribution, amount contributed, or expenditure shall be fully disclosed in accordance with rules promulgated by the Commission. The Commission is authorized to prescribe such rules as may be necessary to carry out the provisions of this section.

§ 439b. Prohibition of franked solicitations

No, Senator, Representative, Resident Commissioner, or Delegate shall make any solicitations of funds by a mailing under the frank under section 3210 of Title 39, United States Code.

§ 439c. Authorization of appropriations

There are authorized to be appropriated to the Commission for the purpose of carrying out its functions under this Act, and under chapters 95 and 96 of Title 26 of the United States Code, not to exceed $5 million for the fiscal year ending June 30, 1975. There are authorized to be appropriated to the Commission $6,000,000 for the fiscal year ending June 30, 1976, $1,500,000 for the period beginning July 1, 1976, and ending September 30, 1976, and $6,000,000 for the fiscal year ending September 30, 1977.

§ 441a. Limitations on contributions and expenditures[1]

(a) *Contributions by persons and committees.*

(1) No person shall make contributions —

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions —

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

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[1] Sec. 440, "Prohibition of Contributions in Name of Another," was stricken from the United States Code by P.L. 93-443. Its provisions are now governed by Sec. 441f.

Sec. 441, "Penalties," was stricken from the United States Code by P.L. 94-283. Its provisions are now governed by Sec. 441j and 437g.

Sections of the United States Code were stricken from Title 18, U.S.C. by P.L. 94-283, and added to title 2, U.S.C. The Title 18 Sections, and their new Title 2 Section numbers, are as follows: 608 - 441a; 610-441b; 611 - 441c; 612 - 441d; 613 - 441e; 614 - 441f; 615 - 441g; 616 - 441i; 617 - 441h. Section 608(a), "Personal funds of candidate and family," was stricken, except as added to title 26, U.S.C. 9004(d), and 9035(a). Section 608(e), "Expenditures relative to clearly identified candidate," was stricken.

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidates, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party.

For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that —

(A) Nothing in this sentence shall limit transfers between political committees of funds raised through joint fundraising efforts;

(B) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by a State committee of a political party shall not be considered to have been made by a single political committee; and

(C) Nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if (i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices; (ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and (iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) the limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection —

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B) (i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such

candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(b) *Limitations on expenditures.*

(1) No candidate for the office of President of the United States who is eligible under section 9003 of the Internal Revenue Code of 1954 (relating to condition for eligibility for payments) or under section 9033 of the Internal Revenue Code of 1954 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of —

(A) $10,000,000, in the case of a campaign for nomination for election to such office except the aggregate of expenditures under this subparagraph in any one State shall not exceed the greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e)), or $200,000; or

(B) $20,000,000, in the case of a campaign for election to such office.

(2) For purposes of this subsection —

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a Vice Presidential candidate, if it is made by —

(i) an authorized committee or any other agent of the candidate for the purpose of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(c) *Adjustment of limitations based on price index.*

(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (b) and subsection (d) shall be increased by such percent difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1) —

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year 1974.

(d) *Exceptions for national and State committees.*

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) the national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e)). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds —

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of —

(i) two cents multiplied by the voting age population of the State (as certified under subsection (e)); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(e) *Voting age population estimates.* During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each Congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) *Knowing violations*. No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(g) The Commission shall prescribe rules under which any expenditure by a candidate for Presidential nomination for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(h) Notwithstanding any other provision of this Act, amounts totaling not more than $17,500 may be contributed to a candidate for nomination for election, or election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees.

§ 441b. Contributions or expenditures by national banks, corporations or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice

Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or for any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section, and section 12(h) of the Public Utility Holding Company Act (15 U.S.C. 79*l*(h)), the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include —

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful —

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), if shall be unlawful —

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately

and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

§ 441c. Contributions by Government contractors

(a) It shall be unlawful for any person —

(1) who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material supplies or equipment to the United States or any department or agency thereof or for selling any land or building

to the United States or any department or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of —

(A) the completion of performance under; or

(B) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land or buildings,

directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use; or

(2) knowingly to solicit any such contribution from any such person for any such purpose during any such period.

(b) This section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any separate segregated fund by any corporation or labor organization, membership organization, cooperative, or corporation without capital stock for the purpose of influencing the nomination for election, or election, of any person to Federal office, unless the provisions of section 441b prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, such fund. Each specific prohibition, allowance, and duty applicable to a corporation, labor organization, or separate segregated fund section 441b applies to a corporation, labor organization, or separate segregated fund to which this subsection applies.

(c) For purposes of this section, the term "labor organization" has the meaning given it by section 441b(b)(1).

§ 441d. Publication or distribution of political statements

Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication —

(1) if authorized by a candidate, his authorized political committees or their agents, shall clearly and conspicuously, in accordance with regulations prescribed by the Commission, state that the communication has been authorized; or

(2) if not authorized by a candidate, his authorized political committees, or their agents, shall clearly and conspicuously, in accordance with regulations prescribed by the Commission, state that the communication is not authorized by any candidate, and state the name of the person who made or financed the expenditure for the communication, including, in the case of a political committee, the name of any affiliated or connected organization required to be disclosed under section 433(b)(2).

441e. Contributions by foreign nationals

(a) It shall be unlawful for a foreign national, directly or through any other person to make any contribution of money or other thing of value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office; or for any person to solicit, accept, or receive any such contribution from any such foreign national.

(b) As used in this section, the term "foreign national" means

(1) a foreign principal, as such term is defined by section 1(b) of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611(b)), except that the term "foreign national" shall not include any individual who is a citizen of the United States; or

(2) an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined by section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(20)).

§ 441f. Prohibition of contributions in name of another

No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

§ 441g. Limitation on contributions of currency

No person shall make contributions of currency of the United States or currency of any foreign country to or for the benefit of any candidate which, in the aggregate, exceed $100, with respect to any campaign of such candidate for nomination for election, for for election, to Federal office.

§ 441h. Fraudulent misrepresentation of campaign authority

No person who is a candidate for Federal office or an employee or agent of such a candidate shall —

(1) fraudulently misrepresent himself or any committee or organization under his control as speaking or writing

or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof; or

(2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).

§ 441i. Acceptance of excessive honorariums

(a) No person while an elected or appointed officer or employee of any branch of the Federal Government shall accept —

(1) any honorarium of more than $2,000 (excluding amounts accepted for actual travel and substence expenses for such person and his spouse or an aide to such person, and excluding amounts paid or incurred for any agents' fees or commissions) for any appearance, speech, or article; or

(2) honorariums (not prohibited by paragraph (1) of this section) aggregating more than $25,000 in any calendar year.

(b) * If an honorarium payable to a person is paid instead at his request to a charitable organization selected by payor from a list of 5 or more charitable organizations provided by that person, that person shall not be treated, for purposes of subsection (a), as accepting that honorarium. For purposes of this subsection, the term 'charitable organization' means an organization described in section 170(c) of the Internal Revenue Code of 1954.

(c) * For purposes of determining the aggregate amount of honorariums received by a person during any calendar year, amounts returned to the person paying an honorarium before the close of the calendar year in which it was received shall be disregarded.

(d) * For purposes of paragraph (2) of subsection (a), an honorarium shall be treated as accepted only in the year in which that honorarium is received.

*** EDITORIAL NOTE; NOTICE OF AMENDMENT TO 2 U.S.C. § 441i**: *Section (b), (c) and (d) were added to 2 U.S.C. § 441i by Public Law 95-216 (H.R.-9340) which was signed into law on December 20, 1977. That Act provided that "[these] amendments . . . shall apply with respect to any honorarium received after December 31, 1976."*

§ 441j. Penalty for violations

(a) Any person, following the date of the enactment of this section, who knowingly and willfully commits a violation of any provision or provisions of this Act which involves the making, receiving, or reporting of any contribution or expenditure having a value in the aggregate of $1,000 or more during a calendar year shall be fined in an amount which does not exceed the greater of $25,000 or 300 percent of the amount of any contribution or expenditure involved in such violation, imprisoned for not more than one year, or both.

In the case of a knowing and willful violation of section 441b(b)(3), including such a violation of the provisions of such section as applicable through section 441c(b), of section 441f, or of section 441g, the penalties set forth in this section shall apply to a violation involving an amount having a value in the aggregate of $250 or more during a calendar year.

In the case of a knowing and willful violation of section 441h, the penalties set forth in this section shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(b) A defendant in any criminal action brought for the violation of a provision of this Act, or of a provision of chapter 95

or chapter 96 of the Internal Revenue Code of 1954, may introduce as evidence of his lack of knowledge of or intent to commit the offense for which the action was brought a conciliation agreement entered into between the defendant and the Commission under section 437g which specifically deals with the Act or failure to act constituting such offense and which is still in effect.

(c) In any criminal action brought for a violation of a provision of this Act, or of a provision of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, the court before which such action is brought shall take into account, in weighing the seriousness of the offense and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether —

(1) the specific act or failure to act which constitutes the offense for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under section 437g;

(2) the conciliation agreement is in effect; and

(3) the defendant is, with respect to the violation involved in compliance with the conciliation agreement.

Editorial Note; Savings Provision: Section 114 of the "Federal Election Campaign Act Amendments of 1976," P.L. 943-283, contains the following savings provision.

"Except as otherwise provided by this Act, the repeal by this Act of any section or penalty shall not have the effect of releasing or extinguishing any penalty, forfeiture, or liability incurred under such section or penalty, and such section or penalty shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of any penalty, forfeiture, or liability."

§ 442. Authority to procure technical support and other services and incur travel expenses; payment of such expenses

For the purpose of carrying out his duties under the Federal Election Campaign Act of 1971 [as amended], the Secretary of the Senate is authorized from and after July 1, 1972 —

(1) to procure technical support services,

(2) to procure the temporary or intermittent services of individual technicians, experts, or consultants, or organizations thereof, in the same manner and under the same conditions, to the extent applicable, as a standing committee of the Senate may procure such services under section 72a(i) of this title,

(3) with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable basis the services of personnel of any such department or agency, and

(4) to incur official expenses.

Payments to carry out the provisions of this paragraph shall be made from funds included in the appropriation "Miscellaneous Items" under the heading "Contingent Expenses of the Senate" upon vouchers approved by the Secretary of the Senate. All sums received by the Secretary under authority of the Federal Election Campaign Act of 1971 [as amended] shall be covered into the Treasury as miscellaneous receipts.

§ 451. Extension of credit by regulated industries; regulations

The Civil Aeronautics Board, the Federal Communications Commission, and the Interstate Commerce Commission shall each promulgate, within 90 days after February 7, 1972, its

own regulations with respect to the extension of credit, without security, by any person regulated by such Board or Commission to any candidate for Federal office, or to any person on behalf of such a candidate, for goods furnished or services rendered in connection with the campaign of such candidate for nomination for election, or election, to such office.

§ 452. Prohibition against use of certain Federal funds for election activities; definitions

No part of any funds appropriated to carry out the Economic Opportunity Act of 1964 shall be used to finance, directly or indirectly, any activity designed to influence the outcome of any election to Federal office, or any voter registration activity, or to pay the salary of any officer or employee of the Office of Economic Opportunity who, in his official capacity as such an officer or employee, engages in any such activity.

§ 453. Effect on State law

The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

§ 454. Partial invalidity

If any provision of this title, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the title and the application of such provision to other persons and circumstances shall not be affected thereby.

§ 455. Period of limitations[4]

(a) No person shall be prosecuted, tried, or punished for any violation of title III of this Act, unless the indictment is found or the information is instituted within 3 years after the date of the violation.

(b) Notwithstanding any other provision of law —

(1) the period of limitations referred to in subsection (a) shall apply with respect to violations referred to in such subsection committed before, on, or after the effective date of this section; and

(2) no criminal proceeding shall be instituted against any person for any act or omission which was a violation of any provision of Title III of this Act, as in effect on December 31, 1974, if such act or omission does not constitute a violation of any such provision, as amended by the Federal Election Campaign Act Amendments of 1974.

Nothing in this subsection shall affect any proceeding pending in any court of the United States on the effective date of this section.

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[4] Sec. 456, "Additional enforcement authority," was stricken from the United States Code by P.L. 94-283.